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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RANSOM THEODORE SPURLOCK, *et al.*,
Petitioners,

v.

SANTA FE PACIFIC RAILROAD COMPANY AND
KERR-McGEE CORPORATION,
Respondents.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA

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APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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1 CA-CIV 6938
DEPARTMENT C

RANSOM THEODORE SPURLOCK and VERNIE MARIA SPURLOCK, his wife; and CHARLES PATRICK SPURLOCK and NANCY JENEEN SPURLOCK, his wife,

Plaintiffs-Appellees,

v.

SANTA FE PACIFIC RAILROAD COMPANY, a corporation; and KERR-MCGEE CORPORATION, a Delaware corporation,

Defendants-Appellants.

Appeal from the Superior Court of Apache County
Cause Nos. C-4779, 4910, 4936, 4961, 4949, and 4998
(consolidated)

The Honorable Paul G. Rosenblatt, Judge

AFFIRMED IN PART; REVERSED IN PART

[Filed Oct. 18, 1984]

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OPINION

MEYERSON, Judge

I. NATURE OF THE ACTION

The issues involved in this appeal arise from an action filed by Ransom and Vernie Spurlock and Charles and Nancy Spurlock (hereinafter collectively referred to as Spurlock) charging the defendants-appellants with the conversion of helium extracted from deposits underlying lands owned by Spurlock.

The conversion charges against defendant Santa Fe Pacific Railroad Company (Santa Fe Pacific) were based on the extraction of helium from underneath Spurlock's lands by various third parties who had leased mineral rights from Santa Fe Pacific. Santa Fe Pacific previously owned all of the ranch lands involved and claimed ownership of the underlying helium and other substances by reason of a mineral reservation in its original conveyances to Spurlock's predecessors in title. In addition to requesting damages for the conversion of helium, Spurlock also sought to quiet title to the helium as against Santa Fe Pacific. The conversion charges against defendant Kerr-McGee Corporation (Kerr-McGee) were based on the purchase of the raw helium gas by Kerr-McGee from Santa Fe Pacific's mineral lessees for processing at a plant constructed by Kerr-McGee for that purpose.

After the filing of the Spurlock action for conversion of the helium, Santa Fe Pacific filed separate actions

against Spurlock seeking to quiet Santa Fe Pacific's title under the mineral reservation clause to nitrogen, potash, petrified wood and industrial clay. Subsequently, Spurlock also filed a quiet title action against Santa Fe Pacific relating to sand and gravel on the lands involved. As to the sand and gravel, Santa Fe Pacific did not claim ownership by reason of the mineral reservation clause, but rather claimed a nonexclusive right to take gravel and ballast for railroad purposes pursuant to a different provision contained in the deeds to Spurlock's predecessors in title. These actions were all consolidated in the trial court proceedings.

After the denial by the trial judge of various motions and cross-motions for summary judgment, the consolidated matters eventually proceeded to trial before a jury.[1] An extended trial lasting approximately eight months was held, and eventually judgments were entered in favor of Spurlock and against Santa Fe Pacific and Kerr-McGee on virtually all issues. These judgments quieted title in favor of Spurlock and against Santa Fe Pacific as to all of the substances in issue, with an award to Spurlock of attorney's fees on the quiet title issues.

On the conversion claim, judgment was entered against Santa Fe Pacific in the amount of $664,502 for compensatory damages and in the amount of $20,000,000 for punitive damages. The judgment against Kerr-McGee on the conversion claim was in the amount of $250,305 for compensatory damages and $487,732 for punitive damages. Spurlock was also awarded pre-judgment interest on the compensatory damages awards. Attorney's fees were awarded to Spurlock in the amount of $525,000 against Santa Fe Pacific and $325,000 against Kerr-McGee.

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[1] As to the quiet title claims, the jury's function was advisory only.

Many issues have been raised in this appeal by Santa Fe Pacific and Kerr-McGee, and we will not attempt in this preliminary overview to state these issues individually or to set forth in detail the complete factual background necessary for their resolution. However, a principal issue involves the trial judge's refusal to grant judgment as a matter of law in favor of Santa Fe Pacific and Kerr-McGee under the mineral reservation clause. Other issues concern alleged misconduct of counsel for Spurlock; the trial judge's legal conclusions regarding the corporate nonexistence of Santa Fe Pacific; the trial judge's conclusion that the mineral reservation clause was void in its entirety; the sufficiency of the evidence to support the amount of compensatory damages awarded; and the amount and propriety of an award for punitive damages in an action for conversion of minerals in place. In light of our holding that judgment as a matter of law should have been rendered in favor of Santa Fe Pacific and Kerr-McGee (on all claims except sand and gravel), we need not reach every issue raised by appellants.

II. THE MINERAL RESERVATION

A. *Factual Background*

Prior to 1946, Santa Fe Pacific was the owner in fee simple of virtually all of the lawsuit lands. Most of these lands were acquired by Santa Fe Pacific under patents issued by the United States. The remainder of these lands was acquired by warranty deed from the New Mexico and Arizona Land Company. Santa Fe Pacific leased almost all of this property for grazing purposes. During 1945 and 1946, Santa Fe Pacific decided to sell many of its land holdings and offered the lands for sale to its grazing lessees. Each of these offers was made by a letter from E. O. Hemenway, the land commissioner of Santa Fe Pacific, to the grazing lessee, and each letter

stated that Santa Fe Pacific intended to "retain all minerals."

Under this program, in three separate transactions, Santa Fe Pacific conveyed what became the lawsuit lands to others. In 1946, Santa Fe Pacific conveyed by warranty deed 864.35 acres to Grace Porter. In 1947, Santa Fe Pacific contracted to sell some 76,000 acres of its holdings to Cowden Livestock Company and approximately 37,000 acres to the partnership of Spurlock & Wetzler. In September of 1951, Santa Fe Pacific issued warranty deeds to Cowden Livestock Company and Spurlock & Wetzler. Each of the three warranty deeds contained an identical reservation. See Section II.B., *infra.*

In 1950, non-combustible helium-bearing gas was discovered in the "Pinta Dome," an area to the west of the lawsuit lands and the Spurlock ranch. Kerr-McGee and others began to explore for and develop this helium-bearing gas. By 1959-60, exploration efforts expanded to the east into an area on the Spurlock ranch known as Navajo Springs, which was largely land subject to the Santa Fe Pacific mineral reservation. Beginning in 1959, Santa Fe Pacific entered into mineral leases for portions of the lawsuit lands with persons interested in exploring for and producing helium gas. In 1960, helium-bearing gas deposits were discovered under the lawsuit lands.

B. *Law of Other Jurisdictions*

The primary issue in this case is whether a deed reservation of "all oil, gas, coal and minerals whatsover, already found or which may hereafter be found, upon or under said lands" [2] includes the disputed substances of

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[2] The reservation, in its entirety, is as follows:

> Grantor expressly reserves and excepts all oil, gas, coal and minerals whatsoever, already found or which may hereafter be found, upon or under said lands, with the right to prospect for, mine and remove the same, and to use so much of the surface of said lands as shall be necessary and convenient for shafts,

helium, nitrogen, potash, petrified wood, and industrial clay. Although we find no Arizona cases construing such a reservation, similar provisions have been the source of extensive litigation in other jurisdictions.

All jurisdictions agree that in construing deeds, the court's role is to give effect to the intent of the contracting parties. *E.g., Shulansky v. Michaels*, 14 Ariz. App. 402, 405, 484 P.2d 14, 17 (1971). If the instrument is unambiguous, the intent of the parties must be discerned from the four corners of of the document. *E.g., Pass v. Stephens*, 22 Ariz. 461, 466, 198 P. 712, 714 (1921). If, however, the instrument is ambiguous, then extrinsic evidence of intent is admissible. *Id.*, 198 P. at 714.

But beyond agreeing on these basic principles of construction, courts have adopted varying approaches to ascertain what substances the parties intended to include in a general mineral reservation. Courts have focused their analysis on the proper definition of "mineral" with widely divergent results. Because of the importance of this issue in Arizona, we believe it appropriate to summarize some of the common approaches used in other jurisdictions.

Some courts find the term mineral [3] to be inherently (and always) ambiguous and admit extrinsic evidence to determine the parties' intent. In Colorado, for example, extrinsic evidence is admissible to show what the word mineral means "in the vernacular of the mining world, the commercial world and [to] landowners at the time of the grant, and whether the particular substance

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wells, tanks, pipe lines, rights of way, railroad tracks, storage purposes, and other and different structures and purposes necessary and convenient for the digging, drilling and working of any mines or wells which may be operated on said lands.

[3] Throughout this opinion the term "mineral" will be used to refer to general mineral reservations regardless of the precise terminology employed. Courts have not differentiated among reservations of "all minerals," "minerals," "minerals of whatever kind," "all minerals whatsoever," etc.

was so regarded as a mineral." *Morrison v. Socolofsky*, 43 Colo. App. 212, 213, 600 P.2d 121, 122 (1979) (quoting *Farrell v. Sayre*, 129 Colo. 368, 373, 270 P.2d 190, 193 (1954)). Thus, in determining whether gravel was included within a reservation of "oil, gas and other minerals," the *Morrison* court concluded that evidence regarding the geological location of gravel with respect to the surface, the impact on the surface of extracting the gravel deposits, the nature of the use of the surface estate, and testimony of geologists-consultants in the gravel industry and of agricultural lenders and landowners on the common meaning of the term mineral at the time of the conveyance, were all properly admissible as bearing on the parties' intent. *Id.* at 214, 600 P.2d at 122.

Likewise the Arkansas courts find the term mineral to be ambiguous and require the admission of extrinsic evidence as to whether the substance at issue would be considered a mineral in the common commercial speech and usage at the time of the conveyance. *See, e.g., Thomas v. Markham & Brown, Inc.*, 353 F. Supp. 498 (E.D. Ark. 1973) (pulaskite stone not considered a mineral at the time of the conveyance); *Middleton v. Western Coal & Mining Co.*, 241 F. Supp. 407 (W.D. Ark. 1965) ("other minerals" does not include oil and gas).

A second general approach used by many jurisdictions is to find the term mineral to be unambiguous. Under this view, a grant or reservation containing the word mineral is found to completely sever the mineral estate from the surface estate. *Amoco Prod. Co. v. Guild Trust*, 636 F.2d 261, 265 (10th Cir. 1980), *cert. denied*, 452 U.S. 967, 101 S. Ct. 3123, 69 L. Ed. 2d 981 (1981) (oil and gas are minerals). In *Union Pac. Land Resources Corp. v. Moench Inv. Co.*, 696 F.2d 88 (10th Cir. 1982), *cert. denied*, —— U.S. ——, 103 S. Ct. 1776, 76 L. Ed. 2d 348 (1983), the court found a reservation in a conveyance by the Union Pacific Railroad Company, a

successor to a federally-chartered corporation, to be unambiguous. The deed reserved to the railroad all "coal and other minerals." Applying Wyoming law, the court found the term minerals was unambiguous and included oil and gas. *Id.* at 93. Other courts use the doctrine of *ejusdem generis* to make the term unambiguous.[4] *Allen v. Farmers Union Co-Op. Royalty Co.*, 538 P.2d 204 (Okla. 1975).

Despite the lack of ambiguity, many of these courts still admit extrinsic evidence to ascertain whether the substance at issue is commercially valuable, commonly regarded as a mineral, and/or whether extraction of the substance would result in surface destruction. For example, in *Geothermal Kinetics, Inc. v. Union Oil Co.*, 75 Cal. App. 3d 56, 141 Cal. Rptr. 879 (1977), the court found the reservation of "all minerals" reflected the general intent to reserve "those commercially valuable, underground, physical resources of the property." *Id.* at 62, 141 Cal. Rptr. at 882. The court described the expectation of the parties as being that the enjoyment of the mineral estate "would not destroy the surface estate and would involve resources distinct from the surface soil." *Id.*, 141 Cal. Rptr. at 882. The trial court found that the "mining" of geothermal steam would not substantially destroy the surface of the property. *Id.* at 61, 141 Cal. Rptr. at 881-82.

Some of these jurisdictions determine that all commercially valuable substances that are commonly understood to be within the technical and/or practical mean-

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[4] *Ejusdem generis* is essentially a rule of construction whereby the term minerals is limited to substances of the same species as minerals previously enumerated. Thus, a lease of "natural gas, petroleum and other mineral substances" would include only those minerals related to oil and gas in nature. *Wulf v. Shultz*, 211 Kan. 724, 508 P.2d 896 (1973). Some courts that determine the term mineral is ambiguous also employ *ejusdem generis* to define what substances are within a general mineral reservation. *See Keller v. Ely*, 192 Kan. 698, 391 P.2d 132 (1964).

ings of the term mineral are included in a general mineral reservation, even though development of these substances would result in surface destruction. *See, e.g., Moser v. United States Steel Corp.*, No. B-9735 (Tex. Sup. Ct. June 27, 1984); *New Mexico & Ariz. Land Co. v. Elkins*, 137 F. Supp. 767 (D.N.M.), *appeal dismissed*, 239 F.2d 645 (10th Cir. 1956). But other courts refuse to include substances whose extraction would result in surface destruction or which possess no distinguishing characteristics from the surface itself. *E.g., Wulf v. Shultz.*

Perhaps because of the disparate results produced by the above approaches, some courts have concluded that the term mineral may be ambiguous or unambiguous depending upon the circumstances of the case. Thus, in Kansas, a reservation of "all of the oil, gas and other minerals in and under, and that may be produced from" the land was ambiguous as to commercial clay, *Hans v. Great Bend Brick & Tile Co.*, 172 Kan. 478, 241 P.2d 475 (1952); but a lease of "natural gas, petroleum and other mineral substances" unambiguously excluded limestone, coal, clay, gypsum, gravel, rock and dirt under the doctrine of *ejusdem generis*. *Wulf v. Shultz.* In Kentucky, a reservation of all local and mineral rights unambiguously includes oil and gas, *Kentucky-West Virginia Gas Co. v. Browning*, 521 S.W.2d 516 (Ky. App. 1975), but a reservation of minerals, oil, and gas is ambiguous with respect to clay and sandstone constituting about 75% of the subsurface. *Cumberland Mineral Co. v. United States*, 513 F.2d 1399 (Ct. Cl. 1975).

Finally, some courts rely on legislative intent or rules of construction to determnie the extent of a mineral reservation. *E.g., Watt v. Western Nuclear, Inc.*, —— U.S. ——, 103 S. Ct. 2218, 76 L. Ed. 2d 400 (1983) (the term minerals under the Stock-Raising Homestead Act of 1916 includes gravel). California courts have utilized state legislation regulating mineral and geothermal resources

to aid in the interpretation of the term mineral. *Pariani v. State*, 105 Cal. App. 3d 923, 164 Cal. Rptr. 683 (1980). In Colorado and Washington, grants are to be construed against the grantor. *Bell Petroleum Co. v. Cross V. Cattle Co.*, 492 P.2d 80 (Colo. App. 1971); *Weyerhaeuser Co. v. Burlington Northern, Inc.*, 15 Wash. App. 314, 549 P.2d 54 (1976). North Dakota has a statute requiring reservations of certain substances to be specifically and separately set forth in the instrument. *MacMaster v. Onstad*, 86 N.W.2d 36 (N.D. 1957). And in a very recent decision, Division Two of this court held that pantano clay was a mineral within the contemplation of Arizona's mineral leasing laws. *Tanner Cos. v. Arizona State Land Dept.*, 2 CA-CIV 4798 (Ariz. App. July 18, 1984). This holding is of little assistance in the case before us because it concerns the authority of the land department to lease state lands for mineral exploration—a case involving the department's power under an extensive statutory scheme. *See also State Land Dept. v. Tucson Rock & Sand Co.*, 107 Ariz. 74, 481 P.2d 867 (1971).

C. *Critique of Other Jurisdictions*

Each of the above approaches has its drawbacks. Jurisdiction utilizing the same general approach reach different conclusions as to what substances are minerals. Inconsistent results are even produced within a single jurisdiction. *E.g., compare United States v. 1,253.14 Acres of Land*, 455 F.2d 1177 (10th Cir. 1972) (under Colorado Law, "all minerals" includes sand and gravel) with *Morrison v. Socolofsky*, 43 Colo. App. 212, 600 P.2d 121 (1979) (reservation of "other minerals" did not include gravel).

Courts that hold mineral to be an ambiguous term are often thrust into a complex and hopeless search for the "true intentions" of the original contracting parties. With the passage of decades and a series of mesne con-

veyances, this task can be impossible.[5] And, as many courts have noted, attempting to discover the parties' specific intent regarding a substance that was unknown to anyone at the time of the original conveyance is antilogical. *E.g.*, *Northern Nat. Gas Co. v. Grounds*, 441 F.2d 704, 714 (10th Cir.), *cert. denied*, 404 U.S. 951, 92 S. Ct. 268, 30 L. Ed. 2d 267 (1971). The most consistent results produced by these cases are title uncertainty and the need to litigate each mineral reservation to determine what substances it encompasses.[6] "[T]he

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[5] The difficulties inherent in this approach are highlighted by the facts of this case. The land which is the subject of this lawsuit was initially held by Santa Fe Pacific. The land was conveyed in three separate transactions to Spurlock's predecessors. Spurlock eventually succeeded to the titles in all three transactions.

The negotiations for these transactions were handled by E. O. Hemenway on behalf of Santa Fe Pacific. He negotiated with Grace Porter about the sale to her; with Ray Cowden about the sale to Cowden Livestock Company; and with J. C. Wetzler about the sale to Spurlock & Wetzler. Mr. Hemenway and Mrs. Porter died before the commencement of these proceedings.

The difficulty in ascertaining the intent of the parties in the three transactions is apparent. Two of the principals are deceased. The remaining participants in the transactions were asked to testify as to their intent about events transpiring almost forty years ago. Much of the trial time was consumed by testimony concerning the intent of the parties to the three conveyances.

[6] The trial court reasoned that minerals is an ambiguous term because "[t]aking *minerals* from the general trichotomy of animal, vegetable or mineral, it means everything which is not animal or vegetable." Applying this logic, Spurlock argues that the reservation therefore consumes the grant and invalidates it.

The trial court's approach was repudiated by the United States Supreme Court over eighty years ago.

> [T]he scientific division of all matter into the animal, vegetable, or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom, and therefore could not be excepted from the grant without being destructive of it.

Northern Pac. Ry. Co. v. Soderberg, 188 U.S. 526, 530, 23 S. Ct. 365, 367, 47 L. Ed. 575, 581 (1903). To apply the rule enunciated

courts ultimately determine the meaning of the word 'minerals,' and all too often the only reliable rule appears to be that the word 'minerals' means what the courts say it means." Reeves, *The Meaning of the Word "Minerals,"* 54 N.D.L. Rev. 419, 482 (1978).

> To hold the term 'other minerals' ambiguous as a matter of law appears at first glance to be a laudable attempt by the courts to give effect to the intentions of the grantor. However, this assumes that the grantor had a specific and identifiable intent that can be discovered. The discovery of the grantor's intent, particularly in a remote transaction, is difficult. The problem with the ambiguity approach is that it creates instant uncertainty about any conveyance using 'other minerals' or 'all minerals.' It is almost impossible for an outsider or prospective purchaser to detemine what was granted or reserved. The effect of this approach is to encourage or increase the amount of litigation to determine the scope of the grant or reservation.

Comment, *A Proposal for the Construction of "Other Minerals" in Idaho*, 18 Idaho L. Rev. 97, 104 (1982) (Comment).

To alleviate these problems, many courts find the term minerals to be unambiguous. Under this approach title uncertainty is minimized and courts are able to avoid the tortuous process of attempting to discover the parties' specific intent. *See, e.g., Moser v. United States Steel Corp.*, No. B-9735 (Tex. Sup. Ct. June 27, 1984).

> The policy considerations in favor of this interpretation are considerable. An established rule of law provides a reliable means of ascertaining mineral ownership. This certainty is important because of

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by the trial court would result in the reservation consuming the conveyance, a result certainly not intended by the parties. Thus, the animal, mineral, vegetable approach is not correct.

> the heavy investment of capital required to develop petroleum and other mineral resources. Without an established rule of law, the courts would necessarily be called upon to interpret numerous reservations. This is evident from the series of cases that result in states following Arkansas authority. With every new technology that develops a use for a particular gas or hard rock mineral, resort is made to the courts. Conservation of judicial resources is another valuable advantage of [this] rule.

Amoco Prod. Co. v. Guild Trust, 636 F.2d 261, 265 (10th Cir. 1980), *cert. denied*, 452 U.S. 967, 101 S. Ct. 3123, 69 L. Ed. 2d 981 (1981) (quoting *Amoco Prod. Co. v. Guild Trust*, 461 F. Supp. 279, 283 (D. Wyo. 1978)).

This approach, however, is not always free from difficulty. In jurisdictions which attempt to narrowly define minerals as only those substances whose extraction does not result in surface destruction, courts must still examine scientific and geological evidence to determine the mineral composition of the land and the impact of mineral production on the surface estate. *Downstate Stone Co. v. United States*, 712 F.2d 1215 (7th Cir. 1983). Courts employing a legal standard of those substances "technically or commonly understood" to be minerals may have to admit evidence of custom or usage. *See, e.g., New Mexico & Ariz. Land. Co. v. Elkins*, 137 F. Supp. 767 (D.N.M.), *appeal dismissed*, 239 F.2d 645 (10th Cir. 1956).

Furthermore, the unambiguous approach may result in "ignoring the intent of parties which might have been discovered through diligent examination of extrinsic evidence." Comment at 101. This problem is exacerbated in jurisdictions employing *ejusdem generis* to arbitrarily and often artificially limit the substances included within

the term mineral.[7] *Allen v. Farmers Union Co-op. Royalty Co.*, 538 P.2d 204 (Okla. 1975) (reservation of "all oil, gas & mineral rights" does not include copper, silver, gold or any other metallic ores under *ejusdem generis*); *Hammett Oil Co. v. Gypsy Oil Co.*, 95 Okla. 235, 218 P. 501 (1921) ("oil and gas" does not include casing head gas).

D. *Conclusion*

1. Ownership

On balance, however, we believe the better reasoned approach is to treat the term minerals as unambiguous. Thus, it becomes the court's duty to determine the extent of a general reservation as a matter of law, without resorting to extrinsic evidence to try to establish any unexpressed, subjective intent of the parties. In this context, we believe a reservation of "all minerals whatsoever" reflects a *general* intent of the parties to sever the surface estate from the underlying mineral estate. *Maynard v. McHenry*, 271 Ky. 642, 113 S.W.2d 13 (1938). It indicates that the parties intended to create two distinct, co-existing, and individualy valuable estates. Thus, the grantor retains ownership of all commercially valuable substances separate from the soil, while the grantee assumes ownership of a surface that has value in its use and enjoyment. *See Watt v. Western Nuclear, Inc.*, —— U.S. ——, ——, 103 S. Ct. 2213, 2226-29, 76 L. Ed. 2d 400, —— (1983). The grantor further retains ownership of mineral substances that are unknown at the time of the conveyance. *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704 (10th Cir.), *cert. denied*, 404 U.S. 951, 92

[7] A related problem with the use of *ejusdem generis* is the difficulty some courts have in determining what is the common characteristic among the minerals enumerated in order to apply the doctrine to disputed substances. *See, e.g., Western Dev. Co. v. Nell*, 4 Utah 2d 112, 288 P.2d 452 (1955); *see generally* Comment at 107-08.

S. Ct. 268, 30 L. Ed. 2d 267 (1971). This approach is consistent with the views expresed by the leading commentators. As Professor Eugene Kuntz observed:

> When a general grant or reservation is made of all minerals without qualifying language, it should be apparent that the parties intended to sever the entire mineral estate from the surface estate, leaving the respective owners of each estate with an estate which is enjoyable in a special manner. The manner of enjoyment of the mineral estate is through extraction and removal of substances from the earth, whereas the enjoyment of such substances as are necessary for the use of the surface, and these respective modes of enjoyment should be taken into account in arriving at the proper subject matter of each estate. The severance of 'minerals' generally should be construed to sever from the surface ownership all substances presently valuable in themselves, apart from their location in the earth, whether their presence is known or not known, and all substances which become valuable through the development of the arts and sciences, and that nothing presently or prospectively valuable as extracted substances would be intended to be excluded from the mineral estate.

1 E. Kuntz, *A Treatise on the Law of Oil and Gas* § 13.3 at 305-06 (1962); Comment, *The Meaning of "Minerals" in Grants and Reservations*, 30 Rocky Mtn. L. Rev. 343, 357 (1958); *see generally* R. Pruitt, *Mineral Terms—Some Problems in Their Use and Definition*, 11 Rocky Mtn. Min. L. Inst. 1 (1966).

2. Surface Destruction

Ownership of the mineral estate, however, is not the only issue which must be addressed in construing a mineral reservation. We must also determine what rights the mineral owner possesses to develop his estate. We

recognize that in order for both the surface and mineral estates to co-exist and retain their individual value, some accommodation between the respective owners is necessary.

In general, the owner of the mineral estate possesses the incidental right of entering, occupying, and utilizing the surface to explore for and develop the underlying minerals. 58 C.J.S. *Mines and Mineral* § 159 (1948). If the grant or reservation specifically authorizes surface destruction by the mineral owner, then courts should give effect to this intention.[8] Rarely, however, is such a right expressly conferred in the conveying instrument. Nevertheless, the court should examine the four corners of the document and give effect to any specific provisions regulating the use of the surface estate by the mineral owner. *See* Reeves, *The Meaning of the Word "Minerals,"* 54 N.D.L. Rev. 419, 442, 450-53 (1978); *MacMaster v. Onstad*, 86 N.W.2d 36 (N.D. 1957).

In the absence of such provisions, the court should focus its analysis on the substances reserved or granted. With respect to minerals specified in the conveyance or minerals commercially known to exist at the time of the conveyance, reasonable destruction of the surface estate is permissible. *Christman v. Emineth*, 212 N.W.2d 543 (N.D. 1973). The enumeration of such minerals indicates a specific intent on the part of the contracting parties that these substances would be fully developed. In essence, the surface owner knew of and agreed to this burden on his estate. It is logical to assume that parties intending to sever the mineral from the surface estate would contemplate some surface destruction in the development of substances which were commonly known to be commercially valuable minerals at the time of the con-

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[8] The reservation in this case grants Santa Fe Pacific the express right to use the surface for "digging, drilling and working of any mines or wells." See Section IV. B., *infra*.

veyance. *Schwarz v. State*, 658 S.W.2d 822 (Tex. App. 1983).

However, no such specific intent can be found with respect to substances which were unknown or had no commercial value at the time of the conveyance. *See, e.g., Pariani v. State*, 105 Cal. App. 3d 923, 930, 164 Cal. Rptr. at 683, 687 (1980); *Northern Natural Gas Co. v. Grounds*, 441 F.2d at 714. The holder of the mineral estate owns such substances, but his development of these resources must not substantially interfere with the surface owner's estate. Only in this way can the general intention of the parties to create and enjoy two co-existing, individually valuable estates be given effect.

Many jurisdictions have recognized that the mineral owner's rights to develop his estate are limited when they infringe upon the surface owner's use and enjoyment of the land itself. Generally, courts solve this conflict by determining that the term minerals excludes substances whose extraction would destroy the surface. For example, in *Farrell v. Sayre*, 129 Colo. 368, 270 P.2d 190 (1954), the Supreme Court of Colorado refused to include sand and gravel in a reservation of "all mineral and mineral rights." Emphasizing that most of the surface was composed of sand and gravel, the court concluded that the contracting parties could not have intended to, in effect, "nullify the grant." Such a result would be tantamount to saying that the grantor retained the entire estate, the deed served no useful purpose, and the grantee received nothing. *Id.* at 372-73, 270 P.2d at 192. *See also Downstate Stone Co. v. United States*, 712 F.2d 1215 (7th Cir. 1983) (limestone); *Christensen v. Chromalloy Am. Corp.*, —— Nev. ——, 656 P.2d 844 (1983) (barite); *New Mexico and Arizona Land Co. v. Elkins Ranch, Inc.*, No. 74-235 (D.N.M. Dec. 3, 1974) (limestone); *State Land Bd. v. State Dept. of Fish &*

Game, 17 Utah 2d 237, 408 P.2d 707 (1965) (sand and gravel).[9]

While this approach protects the surface owner's estate, it is not necessarily an equitable solution to the problem. By refusing to include such substances in the definition of mineral, ownership of such commercially valuable deposits passes to the surface owner. The surface owner himself is then free to extract and commercially produce the substance. This result appears to contravene the parties' original intention that the grantor retain the ownership and profit potential of the mineral resources. Comment, *The Meaning of "Minerals" in Grants and Reservations*, 30 Rocky Mtn. L. Rev. 343, 351 (1958).

The Supreme Court of Alabama distinguished between the ownership itself of a mineral and the incidental rights of the mineral owner to utilize the surface to produce it in *Bibby v. Bunch*, 176 Ala. 585, 58 So. 916 (1912). Recognizing that shale was a mineral and its ownership was retained by the grantor under a reservation of "all minerals and mining rights," the court nonetheless refused to allow shale extraction because of the resultant surface destruction. *Id.* at 588, 58 So. at 917-18. The court concluded that while the mineral owner had the right to some reasonable use of the surface to procure underlying minerals, that right was subservient to the rights of the surface owner to have his estate maintained in its natural condition. *Id.* at 589, 58 So. at 917. *See also New Mexico and Ariz. Land Co. v. Elkins*, 137 F. Supp. 767, 773 (D.N.M.), *appeal dismissed*, 239 F.2d

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[9] Indeed, concern for surface destruction is paramount in the minds of many courts which are called upon to interpret mineral reservations. In our view, the issue of surface destruction is more properly examined as an adjunct to the question of how the mineral estate owner is to exercise his right of ownership. To consider surface destruction as an element of the ownership issue results in inconsistent and varying results which are evidenced in the many reported decisions.

645 (10th Cir. 1956) (finding uranium and thorium to be minerals, but reserving to the surface owner a cause of action against the mineral owner for destruction of his surface interests); *Moser v. United States Steel Corp.*, No. B-9735, *slip op.* at 7 (Tex. Sup. Ct. June 27, 1984).

We believe the distinction drawn by the *Bibby* court is a critical one. It comports with the general intention of the parties to sever the mineral from the surface estate. It gives ownership of commercially valuable substances distinct from the soil to the mineral owner. Yet it also recognizes that rights incidental to that mineral ownership are not unlimited. Thus, as to unspecified minerals, not known to be commercially valuable at the time of the conveyance, the mineral estate owner must not destroy or substantially interfere with the surface owner's right to use and enjoy his land by the mining or taking of minerals.

In the present case, only the issue of ownership rights under the general mineral reservation is before us.[10] Issues relating to the effect of extraction of the disputed substances upon the surface estate have not been briefed or argued before this court. Nor do the judgments below purport to rule on these matters. Accordingly, we do not believe it appropriate for this court to speculate as to whether or not production of any minerals would substantially interfere with the surface estate.

3. Holding

Under the principles expressed herein, we hold that the term minerals as used in this reservation is unambiguous. A reservation of "all oil, gas, coal and minerals whatsoever, already found or which may hereafter be found" indicates the parties' general intention to

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[10] Santa Fe Pacific did not claim ownership of sand and gravel under the general mineral reservation either in the trial court or on appeal. Ownership of sand and gravel was claimed under another provision in the conveyance. This issue is addressed separately.

sever the mineral from the surface estate. No specific intent to limit this reservation is found within other provisions of the deeds nor is contrary extrinsic evidence of intent admissible to vary its effectiveness.

As a matter of law, we hold that helium,[11] nitrogen potash, industrial clay, and petrified wood are minerals and that Santa Fe Pacific retained ownership of them under the general mineral reservation. See *supra* note 2. All are inorganic, commercially valuable substances which are distinct from the soil itself. As we have previously discussed, the fact that the original contracting parties may have been unaware of the existence or value of these minerals at the time of the conveyance is irrelevant to the question of *ownership*.[12]

With respect to sand and gravel, Santa Fe Pacific claims title by virtue of another reservation in the deeds. This reservation permitted Santa Fe Pacific to come upon the surface and take sand and gravel for "railroad purposes." Because specific mention is made of "gravel and ballast," the foregoing discussion concerning the general mineral reservation is not applicable to these substances. The trial court found that Santa Fe Pacific "has abandoned any right it may have had to take sand and gravel for railroad purposes." Santa Fe Pacific has not raised on appeal any issue concerning error with regard to this finding. Thus, the trial court's judgment quieting title to the sand and gravel in favor of Spurlock is affirmed.

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[11] Even if we had not determined that the reservation completely severed the subsurface estate in favor of Santa Fe Pacific, the use of the term "gas" in the reservation would reserve the helium and nitrogen in favor of the railroad. *Northern Natural Gas Co. v. Grounds*, 441 F.2d at 715; *Navajo Tribe of Indians v. United States*, 364 F.2d 320 (Ct. Cl. 1966).

[12] As discussed herein, this knowledge is only relevant to the mineral owner's rights to burden the surface estate in the course of developing and producing these mineral.

III. *DE JURE* AND *DE FACTO* DISSOLUTION; *ULTRA VIRES*

All of the judgments in this consolidated action recite that the reservation clause in the deeds from Santa Fe Pacific to Spurlock's predecessors in interest "is void and unenforceable." This ruling is apparently based upon the trial court's conclusion that Santa Fe Pacific was *de jure* and *de facto* dissolved and that the conveyances were therefore *ultra vires* acts. Immediately after the jury verdicts were read the trial judge stated:

> THE COURT: So that we leave the courtroom in a position to carry on the post-verdict proceedings, the Court will now enter a ruling on the corporate existence of Santa Fe, and it is the Court's finding that Santa Fe Pacific was de jure and de facto dissolved; that the acts of the defendants were ultra vires, consistent with all of the theories propounded by plaintiffs, Spurlocks.
>
> . . .
>
> MR. GILBERT: Would you give that ruling again? I missed part of that.
>
> THE COURT: I had indicated that the Court found that Santa Fe Pacific was de jure and de facto dissolved, that the acts were therefore ultra vires—
>
> MR. GILBERT: What acts, Your Honor?
>
> THE COURT: To the extent that they involved any issue in this lawsuit. If there are theories consistent with that that I've overlooked in that simple statement of findings, they would also be adopted.

The trial court's ruling was apparently based upon Spurlock's contention that Santa Fe Pacific had been *de jure* and *de facto* dissolved at the time it conveyed the lawsuit lands to Spurlock's predecessors in interest. Spurlock also argued successfully to the trial court that pursuant to a 1902 federal law, Act of June 27, 1902, ch.

1159, 32 Stat. 405 (1902 Act), Santa Fe Pacific was required to convey the lawsuit lands to the Atchison, Topeka and Santa Fe Railway Company. Thus, Spurlock contends that since Santa Fe Pacific was not empowered to retain title to these lands under the 1902 Act, it could not have been the legal owner of these lands when it subsequently conveyed them to Spurlock's predecessors.[13] Alternatively, Spurlock argues that Santa Fe Pacific's continued ownership of these lands and/or its conveyances to Spurlock's predecessors were *ultra vires* acts under the terms of the 1902 Act. We find it unnecessary, however, to decipher historical events which transpired eighty years ago because we conclude that Spurlock may not challenge the legal existence of Santa Fe Pacific nor complain that the conveyances were *ultra vires*.

A. *De Jure Dissolution*

The power of Congress to charter corporations to effectuate its lawful purposes is well established. *McCulloch v. Maryland*, 4 Wheat. (U.S.) 316, 4 L. Ed. 579 (1819). Congress, in exercising those powers, has incorporated railroad corporations, including the Santa Fe Pacific. Act of March 3, 1897, ch. 374, 29 Stat. 622. Furthermore, "Congress has not only the power to create a corporation to facilitate the performance of governmental functions, but has the power to protect the operations thus validly authorized." *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21, 32-33, 60 S. Ct. 15, 18, 84 L. Ed. 11, 16 (1939). "[A] power to create implies a power to preserve. . . . [A] power to destroy, if wielded by a

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[13] Exhibits admitted at trial establish that in 1903, Santa Fe Pacific actually conveyed its railroad operating properties to the Atchison, Topeka & Santa Fe Railway Company and its land grant lands to the Santa Fe Pacific Development Company. In 1904, the Santa Fe Pacific Development Company conveyed the lawsuit lands back to Santa Fe Pacific. Spurlock refers to certain fraudulent transfers by Santa Fe Pacific, but we find nothing in the record to sustain that contention.

different hand, is hostile to, and incompatible with these powers to create and to preserve." *McCulloch v. Maryland*, 4 Wheat. (U.S.) at 426, 4 L. Ed. at 606.

The respective supremacies of the state and national governments in their particular spheres must be observed in regard to their power to create and destroy corporations. Neither may terminate the existence of a corporation of the other. *State ex rel. Wilcox v. Curtis*, 35 Conn. 374, 378 (1868). Therefore, "no court can declare a forfeiture of franchise or a dissolution of a corporation except the courts of the jurisdiction which created it." J. Beale, *The Law of Foreign Corporations* § 821 (1904). The state courts must, therefore, look to federal law to determine whether a national, congressionally incorporated corporation, has been dissolved *de jure*. *See generally* 16A W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 7971 (rev. perm. ed. 1979) (Fletcher).

Spurlock has been unable to point to any federal enactment which revokes the corporate charter of Santa Fe Pacific. Instead, Spurlock argues that *de jure* dissolution is effectively accomplished by the 1902 Act. We disagree with Spurlock's strained interpretation of this legislation. The act authorized Santa Fe Pacific

> to sell or lease its railroad and other property, including all rights, powers, privileges, grants, and franchises, to the Atchison, Topeka and Santa Fe Railway Company, a corporation of the State of Kansas, its successors and assigns; but such purchaser or lessee shall take, hold, and use the railroad and property sold or leased subject to all duties, obligations, conditions, and restrictions relating thereto which at the time of such sale or lease shall be binding upon said Santa Fe Pacific Railroad Company as fully as though such sale or lease had not been made; and thereupon such purchaser or lessee shall have and enjoy all rights, powers, privileges, grants,

> and franchises relating to said railroad and property; or any part thereof, that were conferred by Congress upon said Santa Fe Pacific Railroad Company . . . .

32 Stat. at 405. The 1902 Act authorizes Santa Fe Pacific to transfer its railroad and properties to the Atchison, Topeka and Santa Fe Railway Company. The Act does not dissolve Santa Fe Pacific. Nor do we believe it appropriate for the trial court or this court to conjure an unexpressed congressional intent to nullify the corporate existence of the very corporation whose powers Congress was expressly clarifying.

B. *De Facto Dissolution*

Spurlock has argued that Santa Fe Pacific is *de facto* dissolved by virtue of its failure to exercise the rights accorded to it by its articles, or the federal act creating it. This contention is legally and factually unsound.

First, Spurlock has pointed to nothing in the federal law creating Santa Fe Pacific which would even remotely suggest that its corporate existence could be challenged in the state courts. Indeed, the power to dissolve a corporation must find its authority in the law of the sovereign creating the corporation. As in Section III.A., *supra*, we find no federal authority granting to the states the power to dissolve Santa Fe Pacific.

Second, even if Congress had given the states the power to dissolve Santa Fe Pacific, the facts in this case would not sanction the exercise of that power. *De facto* dissolution, in contrast to *de jure* dissolution, is largely a question of fact. The issue is what acts will give rise to a proper determination of corporate nonuse such that a court may declare such corporation *de facto* dissolved. The mere fact that a corporation has stopped doing business does not necessarily constitute a *de facto* dissolution. *Greenville Nat'l Exch. Bank v. Nussbaum*,

154 S.W.2d 672, 674 (Tex. App. 1941). A corporation may cease to exist for all practical purposes, and yet not be dissolved as a matter of law. *See Eastern Grain Elevator Corp. v. McGowan*, 95 F. Supp. 40 (W.D.N.Y. 1950). A corporation does not pass out of existence because it has become insolvent or has lost its property and ceased to carry on business. *Lucas v. Swan*, 67 F.2d 106 (4th Cir. 1933). And finally, the mere transfer of corporate assets is not sufficient to work a dissolution. *E.g., Hunn v. United States*, 60 F.2d 430 (8th Cir. 1932). Only a "total voluntary abandonment of its franchise [charter]" is sufficient to work a *de facto* dissolution. *Id.* at 432.

Contrary to Spurlock's contention, the evidence in this case indicates that Santa Fe Pacific has actively engaged in business from 1897 to the present. Letters, leases and other documents both from and to employees of Santa Fe Pacific evidence the ongoing business of Santa Fe Pacific in the 1940's and 1950's. Santa Fe Pacific offered into evidence minutes of several directors' and stockholders' meetings which reflect that the company was engaging in business. Similarly, the United States continued to recognize the existence of Santa Fe by issuing patents to it which are in evidence in this case.

Further, since 1904, Santa Fe Pacific has been involved in many litigated cases relating to its land grant holdings. Its existence has never been questioned in these suits. *See, e.g., United States v. Santa Fe Pac. R.*, 314 U.S. 339, 62 S. Ct. 248, 86 L. Ed. 260 (1941); *Santa Fe Pac. R. Co. v. Work*, 267 U.S. 511, 45 S. Ct. 400, 69 L. Ed. 764 (1925); *Santa Fe Pac. R. Co. v. Cord*, 14 Ariz. App. 254, 482 P.2d 503, *cert. denied*, 404 U.S. 912, 92 S. Ct. 229, 30 L. Ed. 2d 185 (1971). In *New Mexico ex rel. Caledonian Coal Co. v. Baker*, 196 U.S. 432, 25 S. Ct. 375, 49 L. Ed. 540 (1905), the United States Sureme Court discussed the fact that Santa Fe Pacific had conveyed away its railroad property and was in the busi-

ness of administering its land grants. Nothing in the opinion states that there was anything improper about this arrangement or that Santa Fe Pacific had ceased to be an existing corporation. Thus, we can see no factual basis for the trial court's ruling that Santa Fe Pacific has been dissolved *de facto*.

Finally, even if inactivity by Santa Fe Pacific could somehow constitute *de facto* dissolution, Spurlock would be estopped from denying the company's corporate existence. First, in each complaint, Spurlock alleged that Santa Fe Pacific is an existing corporation. One who sues a corporation as such or who has pleaded that an opposing party is a corporation, has elected to treat that party as a corporation and cannot deny its corporate existence. 8 Fletcher § 3944; *see also American Zinc Prods. Co. v. Sanders*, 175 Ark. 133, 142, 298 S.W. 857, 860 (1927).

Second, Spurlock and his predecessors have dealt with Santa Fe Pacific since the early 1940's as an existing corporation by entering into contracts and leases with Santa Fe Pacific, accepting deeds from Santa Fe Pacific and dealing with Santa Fe Pacific's lessees and accepting surface damages from them. Parties who contract with or otherwise deal with an entity as a corporation are estopped from denying the corporate existence of that entity in a subsequent lawsuit. *Exum Walker, M.D. P.C., Pension Trust v. Joanna M. Knox & Assocs. Inc.*, 132 Ga. App. 12, 13, 207 S.E.2d 570, 572 (1974); *see Associated Students v. Arizona Board of Regents*, 120 Ariz. 100, 103, 584 P.2d 564, 567 (App. 1978).

C. *Ultra Vires Acts*

The trial judge ruled that because Santa Fe Pacific was *de jure* or *de facto* dissolved, the conveyances to Spurlock's predecessors in title were *ultra vires*. But the trial court's holding is a non sequitur. An *ultra vires* act is one outside the corporation's power as found directly

or impliedly in its articles of incorporation. *See Lurie v. Arizona Fertilizer & Chem. Co.*, 101 Ariz. 482, 421 P.2d 330 (1966). Thus, in order for a corporation to perform an *ultra vires* act it must necessarily exist. Having concluded that Santa Fe Pacific had been dissolved, it was logically impossible for the trial court to conclude that "therefore" its conveyances of the lawsuit lands were *ultra vires.*

In any event, Spurlock has no standing to raise a claim that the conveyance by Santa Fe Pacific were *ultra vires.* "[F]ederal corporations derive their existence and powers from acts of Congress, and ordinarily, proceedings to question the right of such corporations to exercise the corporate franchise or powers should be undertaken by the United States." 5 Fletcher § 2336. *See, e.g., First Nat'l Bank v. Missouri*, 263 U.S. 640, 660, 44 S. Ct. 213, 216, 68 L. Ed. 486, 494 (1924).

In summary, we conclude that (1) Congress has not dissolved Santa Fe Pacific; (2) Santa Fe Pacific is not *de facto* dissolved; and (3) Spurlock may not complain that the conveyances of the lawsuit lands by Santa Fe Pacific were *ultra vires.*

IV. ADVERSE POSSESSION AND RULES AGAINST PERPETUITIES

A. *Adverse Possession*

Santa Fe Pacific contends, as an alternative basis for reversal, that it acquired title to certain of the minerals by adverse possession. In light of the holding in Section II., *supra*, we need not reach this contention. Spurlock argues, however, that regardless of how the mineral reservation is construed the judgments should be sustained because he acquired title to the mineral estate by adverse possession. We disagree.

After the surface estate has been severed from the underlying mineral estate, title to the minerals cannot be

acquired by adverse possession of the surface alone.[14] See *generally Annot., 35 A.L.R.2d 124,* 154-55 (1954). Adverse possession requires an actual and visible appropriation of the mineral estate, commenced and continued under a claim of right inconsistent with and hostile to the claim of another. A.R.S. § 12-521(A). Where there has been a severance of the mineral and surface estate, such as in this case, "title by adverse possession can be acquired to the mineral rights, but all the essential elements of adverse possession must exist . . . . The exploration for minerals and mining operations . . . must be open, notorious, continuous and hostile." *McCoy v. Lowrie,* 42 Wash. 2d 24, 26-27, 253 P.2d 415, 417 (1953). *See Lehfeldt v. Adams,* 130 Mont. 395, 303 P.2d 934 (1956). Mining for domestic purposes is insufficient to establish the requisite elements of adverse possession. *Mountain Mission School, Inc. v. Buchanan Realty Corp.,* 207 Va. 518, 151 S.E.2d 403 (1966). Similarly, the occasional taking of minerals, *White v. McNabb,* 140 Ky. 828, 131 S.W. 1021 (App. 1910), or taking from "time to time," *Central Trust Co. v. Harless,* 108 W. Va. 618, 152 S.E. 209 (1930), are likewise insufficient.

Turning to the facts of this case, it is clear that as to the disputed minerals, Spurlock did not acquire title by adverse possession. First, with respect to helium, nitrogen and potash, Spurlock does not contend that he produced these minerals or gained title to them through adverse possession. Second, with respect to industrial clay and petrified wood, there is some evidence that Spurlock has taken these minerals off the land. This evidence shows, however, that the taking by Spurlock was intermittent and erratic and not of a sufficiently continuous nature to establish title by adverse possession.

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[14] Spurlock contends that because the deed conveyances of the lawsuit lands were void, his claim of title to the surface estate is predicated upon the doctrine of adverse possession. But this contention has been rejected. See Section III., *supra.*

B. *Rule Against Perpetuities*

In light of our holding that title to the disputed substances lies with Santa Fe Pacific, it is also necessary to address the propriety of the trial court's ruling that Santa Fe Pacific's reserved right to use the surface to locate and remove minerals is in reality a repurchase option which violates the rule against perpetuities and the rule against unreasonable restraints on alienation. Each of the deeds conveying the lawsuit lands to Spurlock's precedessors provided that Santa Fe Pacific reserved the right:

> [T]o use so much of the surface . . . as shall be necessary and convenient for shafts, wells, tanks, pipe lines, rights of way, railroad tracks, storage purposes, and other and different structures and purposes necessary and convenient for the digging, drilling and working of any mines or wells which may be operated on said lands. Grantor, or its successors or assigns, will pay to Grantee, or the legal representatives, heirs, successors or assigns of Grantee, a fixed price per acre for the surface of all lands appropriated under this exception and reservation, which price shall be equal to the average price per acre paid for all the lands above described, together with the fair value of the buildings and permanent improvements, if any, on the land the surface of which is so appropriated. If the parties cannot agree upon such fair value it shall be fixed by three appraisers, of whom each party shall appoint one and the two so appointed shall appoint the third.

Little time need be spent in establishing that the foregoing does not violate the rule against perpetuities or any rule prohibiting unreasonable restraints on alienation.

The reservation merely states what would otherwise be an implied right to reasonably use the surface in order

to obtain "enjoyment" of the mineral estate. *See Keville v. Hollister Co.*, 29 Cal. App. 3d 203, 105 Cal. Rptr. 238 (1972). In short, the reservation is simply not an option to repurchase the fee title of the surface owner, as claimed by Spurlock, but rather merely a provision for compensation to the surface owner for the reserved right of use incidental to the mineral reservation.

V. CONCLUSION

In conclusion, we hold that the mineral reservation is unambiguous and reflects the intent of the parties to completely sever the mineral estate from the surface estate. Thus, helium, nitrogen, potash, industrial clay and petrified wood are part of the mineral estate and have been reserved by Santa Fe Pacific.[15] With respect to sand and gravel, however, the trial court found that Santa Fe Pacific had abandoned its claim of ownership. Because Santa Fe Pacific has not disputed that ruling on appeal, the judgment granting title to the sand and gravel in Spurlock is affirmed.

We further hold that the trial court erred in ruling that the deed reservation was void in its entirety because Santa Fe Pacific was dissolved *de jure* or *de facto* or that the conveyances were *ultra vires*. Additionally, Spurlock has not acquired the mineral estate by adverse possession. Furthermore, Santa Fe Pacific's reserved right to use the surface for mining activities does not violate the rule against perpetuities nor does it constitute an unreasonable restraint on alienation.

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[15] Santa Fe Pacific has filed a motion for an award of attorney's fees "incurred in that portion of the underlying action in the Superior Court relating" to its claim of title to the helium. Santa Fe Pacific's claim for fees is based upon A.R.S. § 12-1103(B). We need not decide whether a prevailing defendant-counterclaimant in a quiet title action is entitled to fees because even if Santa Fe Pacific could establish its entitlement to fees, in the exercise of our discretion we would decline to award it fees.

Accordingly, we reserve the lower court's judgments quieting title to helium, nitrogen, potash, industrial clay and petrified wood in Spurlock. We reverse the judgments of conversion against Santa Fe Pacific and Kerr-McGee. We affirm the judgment quieting title in sand and rock to Spurlock. On remand, the trial court is directed to enter judgments quieting title to helium, nitrogen, potash, industrial clay and petrified wood in Santa Fe Pacific.

/s/ Bruce Meyerson
BRUCE MEYERSON
Judge

CONCURRING:

/s/ Levi Ray Haire
LEVI RAY HAIRE
Presiding Judge

/s/ William E. Eubank
WILLIAM E. EUBANK
Judge

APPENDIX B

SUPERIOR COURT OF ARIZONA

APACHE COUNTY

Nos. 4779
4910
4936
4961
4949
4998

RANSOM THEODORE SPURLOCK and VERNIE MARIA SPURLOCK, his wife; and CHARLES PATRICK SPURLOCK and NANCY JENEEN SPURLOCK, his wife,

Plaintiffs,

vs.

SANTA FE PACIFIC RAILROAD COMPANY, a corporation; and KERR-McGEE CORPORATION, a Delaware corporation,

Defendants.

JUDGMENT

(4779)

(Helium)

The plaintiffs, Ransom Theodore Spurlock and Vernie Maria Spurlock, his wife; and Charles Patrick Spurlock and Nancy Jeneen Spurlock his wife ("Spurlocks") brought this action against Santa Fe Pacific Railroad Company ("Santa Fe") and Kerr-McGee Corporation ("Kerr-McGee") to quiet title to the helium located on or beneath the land owned by the Spurlocks which land

is located in Apache County, Arizona and is specifically described on the attached Exhibit A which is incorporated herein by reference thereto and to recover damages for the helium removed from the Exhibit A land.

Among the many issues presented was the interpretation and effect of a reservation clause which appeared in the deeds executed by Santa Fe to the Spurlocks' predecessors in interest, to wit: Cowden Livestock Company, Grace Porter, and the partnership of Spurlock and Wetzler taken in the name of R.C. Spurlock and Georganna Spurlock which reservation clause appears on the attached Exhibit B.

The Court ruled on August 22, 1977 that the re-entry clause contained in the first paragraph of the reservation clause set forth on Exhibit B violated the common law rule against restraints upon alienation and the rule against perpetuities.

After an eight month jury trial the Court submitted written interrogatories to the jury pursuant to Rule 39(1) ARCP on advisory issues and general verdict forms on the nonadvisory issues. The Court reserved unto itself certain legal issues concerning the validity and enforceability of the reservation clause on the annexed Exhibit B.

The advisory issues submitted to the jury related to whether the parties to the transactions between Santa Fe and the persons and entities from whom the Spurlocks had acquired the Exhibit A land by mesne conveyances, to wit: Cowden Livestock Company, Grace Porter and the partnership of Spurlock and Wetzler taken in the name of R.C. Spurlock and Georganna Spurlock, ("Spurlocks' predecessors in interest") had a general or specific intent that Santa Fe was to be the owner of the helium located on or beneath the land described on the annexed Exhibit A and whether there existed a custom and usage under which a reservation of "all oil,

gas, coal and minerals whatsoever" reserved unto Santa Fe the helium located on or beneath the lands described on the annexed Exhibit A.

On June 20, 1981, the jury determined in response to the written interrogatories that while the parties to the transactions between Santa Fe and the Spurlocks' predecessors in interest did not have a mutually agreed upon specific intent regarding Santa Fe's ownership of the helium the parties did have a general intent that Santa Fe was not the owner of the helium.

The jury further found, in its answers to written interrogatories, that the terms used in the reservation clause, Exhibit B, were terms for which there was a custom and usage and that the custom and usage existed both in 1947 and 1951, being the dates of the transactions between Santa Fe and the Spurlocks' predecessors in interest. Further, the jury found, in response to written interrogatories, that the custom and usage was applicable to the transactions between Santa Fe and the Spurlocks' predecessors in interest. Finally, the jury found, in the answers to written interrogatories, that under the custom and usage which existed a reservation of "all oil, gas, coal and minerals whatsoever," could not reserve unto Santa Fe the helium located on or beneath the Exhibit A land.

The jury returned a general verdict quieting title to the helium located on or beneath the Exhibit A land in the Spurlocks and assessed damages in the amount of Six Hundred Sixty-Four Thousand Five Hundred Two Dollars ($664,502.00) and punitive damages in the amount of Twenty Million Dollars ($20,000,000.00) against Santa Fe and damages in the amount of Two Hundred Fifty Thousand Three Hundred Five Dollars ($250,305.000) and punitive damages in the amount of Four Hundred Eighty-Seven Thousand Seven Hundred Thirty-Two Dollars ($487,732.00) against Kerr-McGee.

After the jury returned its answers to interrogatories and its general verdict, the Court then ruled upon legal

issues affecting the validity and enforceability of the reservation clause (Exhibit B) in its entirety. The effect of the Court's ruling on those issues was that the reservation clause is, as a matter of law, void and unenforceable in its entirety.

After the jury returned its verdict the Spurlocks filed a motion for prejudgment interest on the actual damages assessed against Santa Fe and Kerr-McGee. On September 30, 1981, the Court granted the Spurlocks' motion for prejudgment interest in the amount of Three Hundred Twenty-Seven Thousand Seven Hundred Thirty-Five Dollars ($327,735.00) as against Sante Fe and in the amount of One Hundred Twenty-Three Thousand Nine Hundred One Dollars ($123,901.00) as against Kerr-McGee. The Court further ruled that the prejudgment interest awarded by the Court would not be subject to post judgment interest.

The Spurlocks, after the jury returned the verdict, moved to add Santa Fe Industries, Inc., ("Industries"), a corporation, as a defendant for the purpose of entering judgment against it upon the ground that Santa Fe was merely an operating division and the alter ego of Industries. Industries had been previously joined as a defendant pursuant to an order of the Court dated June 27, 1980. However, the Court thereafter granted Industries' motion to dismiss it from the action before the trial commenced. The Court ruled on September 30, 1981, that the Court's prior ruling dismissing Industries would not have been entered if the Court had then possessed the knowledge of the relationship between Industries and Santa Fe that was developed during the trial of the case. Further, the Court ruled that Santa Fe was the alter ego of Industries and that Industries had received a fraudulent transfer from Santa Fe but that Industries could not be added as a defendant for the entry of judgment.

On September 30, 1981, the Court entered an order finding that the advisory answers to the interrogatories

submitted to the jury pursuant to Rule 39(1) ARCP were either consistent with, or not inconsistent with the Court's findings on the same issues of fact and entered an order adopting the answers. Also, on September 30, 1981, the Court further entered an order that the answers of the jury to the written interrogatories were not inconsistent with the general verdict on the non advisory issues and directed the entry of judgment thereon.

More than twenty (20) days prior to bringing the action to quiet the title to the helium, the Spurlocks had requested Santa Fe and Kerr-McGee to execute a quit claim deed thereto and tendered to each of Santa Fe and Kerr-McGee Five Dollars ($5.00) for execution and delivery of the deed in compliance with A.R.S. § 12-1103.B., but each of Santa Fe and Kerr-McGee refused to execute the quit claim deed. After the trial of the case, the Spurlocks filed a motion for an award of attorney's fees pursuant to A.R.S. § 12-1103.B. The Court ordered an evidentiary hearing to determine whether the Spurlocks were entitled to attorney's fees and the amount thereof. After the evidentiary hearing the Court read and considered extensive memoranda filed by the Spurlocks, Kerr-McGee and Santa Fe. The Court then ruled that the Spurlocks were entitled to attorney's fees in the amount of Four Hundred Thousand Dollars ($400,000.00) as against Santa Fe and Three Hundred Twenty-Five Thousand Dollars ($325,000.00) as against Kerr-McGee.

Now, therefore, the Court having heard and seen all of the evidence, and having heard and considered all of the arguments of counsel, and having read and considered all of the briefs and memoranda submitted by the parties and being fully advised in the premises:

IT IS ORDERED, ADJUDGED AND DECREED that the reservation clause which is set forth on the annexed Exhibit B and which appears in the deeds to the Exhibit A land from Santa Fe to the Spurlocks' predecessors in interest is void and unenforceable in its entirety; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties to the deeds between Santa Fe and the Spurlocks' predecessors in interest had a mutually agreed upon general intent as to which of them would own the helium located on or beneath the land described on Exhibit A and that the intended owner of the helium was not Santa Fe; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the terms used in the reservation clause contained in the deeds between Santa Fe and the Spurlocks' predecessors in interest were terms for which there was a custom and usage, which custom and usage existed both in 1947 and in 1951, and further, that the custom and usage was applicable to the transactions between Santa Fe and the Spurlocks' predecessors in interest; and, further that a reservation of "all oil, gas, coal and minerals whatsoever" did not reserve title to the helium located on or beneath the land described on the attached Exhibit A; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the rights of reentry contained in the first paragraph of the reservation clause (Exhibit B) contained in the deeds from Santa Fe to the Spurlocks' predecessors in interest violated the rule against restraints upon alienation and the rule against perpetuities; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Santa Fe is the alter ego of Industries and there were fraudulent transfers of property from Santa Fe to Industries; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Spurlocks are the owners of all of the helium located on or beneath the lands described on the annexed Exhibit A and the title to said helium is hereby quieted in the Spurlocks and that Kerr-McGee and Santa Fe have no estate, title, or interest therein, and that the title to the helium in or under the land described on the

annexed Exhibit A is owned by the Spurlocks free and clear of any claim or claims whatsoever of Kerr-McGee or Santa Fe and each of Kerr-McGee and Santa Fe, and any persons claiming by, under or through them, are barred and forever estopped from claiming or having any estate, title, interest, lien or right in or to the helium in or under said land adverse to the Spurlocks; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiffs Spurlocks have and recover judgment against the defendant Santa Fe in the sum of Six Hundred Sixty-Four Thousand Five Hundred Two Dollars ($664,502.00) as and for actual damages; and the sum of Twenty Million Dollars ($20,000,000.00) as and for punitive damages, together with interest on the foregoing sums at the highest legal rate from June 20, 1981, until paid, together with the Spurlocks' costs incurred herein and attorney's fees in the amount of Four Hundred Thousand Dollars ($400,000.00), with the costs and attorney's fees to bear interest at the highest legal rate from the date of this judgment until paid; plus the sum of Three Hundred Twenty-Seven Thousand Seven Hundred Thirty-Five Dollars ($327,735.00) as and for prejudgment interest, which sum shall not bear interest; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs Spurlocks have and recover judgment against the Defendant Kerr-McGee in the sum of Two Hundred Fifty Thousand Three Hundred Five Dollars ($250,305.00) as and for actual damages, and the sum of Four Hundred Eighty-Seven Thousand Seven Hundred Thirty-Two Dollars ($487,732.00) as and for punitive damages, together with interest on the foregoing sums at the highest legal rate from June 20, 1981, until paid, together with the Spurlocks' costs incurred herein and attorney's fees in the amount of Three Hundred Twenty-Five Thousand Dollars ($325,000.00) with the costs and attorney's fees to bear interest at the highest

legal rate from the date of this judgment until paid; plus prejudgment interest in the amount of One Hundred Twenty-Three Thousand Nine Hundred One Dollars ($123,901.00), which sum shall not bear interest.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment is awarded in favor of Santa Fe and Kerr-McGee and against the Spurlocks on Counts Three, Four, Five, Six and Seven of the Spurlocks' Fourth Amended Complaint.

The Court expressly determining herewith that there is no just reason for delay, the Court herewith expressly directs entry of the foregoing Judgment.

DONE IN OPEN COURT this 24 day of May, 1982.

/s/ Paul G. Rosenblatt
THE HONORABLE PAUL G. ROSENBLATT
Judge of the Superior Court

EXHIBIT "A"

PROPERTY DESCRIPTION:

PARCEL NO. 1: Lots 1, 2, 3, 4, 5, and 6; the Northeast quarter of the Southwest quarter; the Southeast quarter of the Northwest quarter; the Southwest quarter of the Northeast quarter and the North half of the Southeast quarter of the Northeast quarter of Section 6, Township 17 North, Range 27 East of the Gila and Salt River Base and Meridian, Apache County, Arizona.

PARCEL NO. 2: All of Sections 1, 3, 5, 7, 9, 11, 13, 15 and 17 and 19; the West half of the West half of Section 29, and all of Section 31, Township 18 North, Range 27 East of the Gila and Salt River Base and Meridian, Apache County, Arizona.

PARCEL NO. 3: Sections 1, 3, 4, 5, 6, 7, and 18 lying North of the Puerco Rim, in Township 18 North, Range 28 East of the Gila and Salt River Base and Meridian, Apache County, Arizona.

PARCEL NO. 4: All of Sections 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34 and 35, in Township 19 North, Range 27 East of the Gila and Salt River Base and Meridian, Apache County, Arizona.

PARCEL NO. 5: All of Sections 6, 7, and Southwest quarter of the Southeast quarter of Section 8, all of Sections 13, 14, 15, 17, 18, 19, 21, 23, 24, 25, 27, 28, 29, 30, 31, 33, 34, and 35, Township 19 North, Range 28 East of the Gila and Salt River Base and Meridian, Apache County, Arizona.

PARCEL NO. 6: All of Section 1; the South half of Section 2; all of Section 3, EXCEPTING THEREFROM a strip of land 400 feet in width adjoining the Southeastly line of the 200 foot wide right of way of the Atchison, Topeka and Santa Fe Railway Company, extending across

said Section; all of Section 9, EXCEPTING THEREFROM a strip of land 400 feet in width adjoining the Southeasterly line of the 200 foot wide right of way of the Atchison, Topeka and Santa Fe Railway Company, and a strip of land 100 feet in width adjoining the Northwesterly line of the said 200 foot wide right of way of the Atchison, Topeka and Santa Fe Railway Company across the North half of said Section; all of Sections 10, 11, 12, 13, 14, and 15; all of Section 17, EXCEPTING THEREFROM all of the triangular portion of the Northwest quarter of said Section 17 lying Northwest of the Northwesterly line of the 200 foot wide right of way of the Atchison, Topeka and Santa Fe Railway Company; the East half of the Southeast quarter of the Northwest quarter; the North half of the Northeast quarter; and the Northwest quarter of the Southwest quarter of Section 18, Township 20 North, Range 27 East of the Gila and Salt River Base and Meridian, Apache County, Arizona.

EXCEPT all those portions of Section 18 describes as follows: The original 200 foot right of way of the Atchison, Topeka and Santa Fe Railroad; and

EXCEPT a 100 foot strip of land adjoining the Northwesterly line of the Atchison, Topeka and Santa Fe Railway Company's 200 foot wide right of way and extending across the North half of the Northeast quarter of said Section 18; and

EXCEPT that portion of Lot 3 (Northwest quarter of the Southwest quarter) of said Section 18, lying between said Northwesterly line of 200 foot right of way and a line drawn parallel from the Northeast corner of said Lot 3 to a point in the West line of said Lot, distant 200 feet Northwesterly at right angles from said 200 foot right of way, All of Sections 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34 and 35, all in Township 20 North, Range 27 East of the Gila and Salt River Base and Meridian, Apache County, Arizona.

EXCEPT a strip of land 306 feet in width situated in the Northwest quarter of the Northwest quarter of Section 18, Township 20 North, Range 27 East of the Gila and Salt River Base and Meridian, Apache County, State of Arizona, lying within the right of way of the relocated Holbrook-Lupton Interstate Highway. Said strip of land lying 210 feet on the northwesterly side of and 96 feet on the Southeasterly side of the following described Eastbound center line of said highway:

BEGINNING at the point of intersection of the Eastbound center line of the relocated Holbrook-Lupton Interstate Highway with the West line of Section 28, at approximate Highway Engineer's Station 825+05, from whence the Northwest corner of said Section 28 bears Northerly approximately 520 feet; thence North 67 degrees 09 minutes 00 seconds East traversing said Section 28 and Sections 21, 22 and 23 approximately 12,678 feet, to a point lying in said Section 23 at Highway Engineer's Station P.C. 951+83.34; thence Northeasterly along a 0 degrees 12 minute curve, concave to the Northwest, a distance of 7808.34 feet, to Highway Engineer's Station P.T. 1029+91.68; thence North 51 degrees 32 minutes 00 seconds East traversing Section 13, a distance of 3356.42 feet, to a point on the East line of said Section 13, at Highway Engineer's Station P.O.T. 1063+48.1, from whence the Northeast corner thereof bears Northerly 53.4 feet; thence continuing North 51 degrees 32 minutes 00 seconds East traversing Sections 18 and 7, a distance of 6914.3 feet, to a point on the East line of said Section 7, at Highway Engineer's Station P.O.T. 1432+62.4, from whence the Northeast corner thereof bears Northerly 1231.3 feet.

PARCEL NO. 7: All of Section 31, Township 20 North, Range 28 East of the Gila and Salt River Base and Meridian, Apache County, Arizona.

PARCEL NO. 8: All of Section 10, containing 640.00 acres, section 12, containing 640.00 acres and section

14, containing 640.00 acres in Township 20 North, Range 26 East of the Gila and Salt River Base and Meridian, Apache County, Arizona.

PARCEL NO. 9: Section 7, containing 626.10 acres, and Lots 1, 2, 3, N-½ NE-¼ and E-½ NW-¼ Section 18, less original 200 foot right of way of the Atchison, Topeka and Santa Fe Railway Company, also less a 100 foot strip of land adjoining the northwesterly line of the Atchison, Topeka and Santa Fe Railway Company's said 200 foot wide right of way and extending across the north half of the northeast quarter of said section 18, containing an area of 5.20 acres, more or less, and also less that portion of Lot 3 of said Section 18 lying between said northwesterly line of 200 foot right of way and a line drawn from the northeast corner of said Lot 3 to a point in the west line of said lot distant 200 feet northwesterly at right angles from said 200 foot right of way, containing an area of 5.00 acres more or less, containing 238.25 acres. Containing in the aggregate eight hundred sixty-four and thirty-five hundredths (864.35) acres, more or less. Township 20 North, Range 27 East of the Gila and Salt River Base and Meridian, Apache County, Arizona.

EXHIBIT B

Grantor expressly reserves and excepts all oil, gas, coal and minerals whatsoever, already found or which may hereafter be found, upon or under said lands, with the right to prospect for, mine and remove the same, and to use so much of the surface of said lands as shall be necessary and convenient for shafts, wells, tanks, pipe lines, rights of way, railroad tracks, storage purposes, and other and different structures and purposes necessary and convenient for the digging, drilling and working of any mines or wells which may be operated on said lands. Grantor, or its successors or assigns, will pay to Grantee, or the legal representatives, heirs, successors or assigns of Grantee, a fixed price per acre for the surface of all lands appropriated under this exception and reservation, which price shall be equal to the average price per acre paid for all the lands above described, together with the fair value of the buildings and permanent improvements, if any, on the land the surface of which is so appropriated. If the parties cannot agree upon such fair value it shall be fixed by three appraisers, of whom each party shall appoint one and the two so appointed shall appoint the third.

This conveyance is made subject to and upon condition that in the event that Grantor, or its successors or assigns, or The Atchison, Topeka and Santa Fe Railway Company, or its successors or assigns, or any railroad company at least a majority of whose stock it owns, may any time hereafter desire to construct across the premises hereinabove described, any railroad tracks, telegraph and telephone lines, or other electric wire lines, oil or water pipe lines, roadways, ditches, flumes or aqueducts, or to operate on said premises gravel and ballast pits and quarries and take material therefrom for railroad purposes, the right of way for any such tracks, telegraph, telephone or other electric wire lines, pipe lines, roadways, ditches, flumes and aqueducts, of sufficient width for the proper

protection, maintenance and operation thereof, and the land necessary and convenient for the operation of such gravel and ballast pits and quarries and the taking of material therefrom for railroad purposes, may be appropriated by any such Company desiring to construct such tracks, wire lines, pipe lines, roadways, ditches, flumes or aqueducts, or to operate such gravel and ballast pits and quarries, upon such Company paying or offering to pay to Grantee, or the legal representatives, heirs, successors or assigns of Grantee, a fixed price per acre for the land so appropriated, which price shall be equal to the average price per acre paid for all the land above described, together with the fair value of all buildings and permanent improvements constructed upon the land so appropriated; and Grantee, or the legal representatives, heirs, successors or assigns of Grantee, will convey to such Company such appropriated right of way upon demand and tender of payment as aforesaid.

SUPERIOR COURT OF ARIZONA

APACHE COUNTY

Nos. 4779
4910
4936
4961
4949
4998

RANSOM THEODORE SPURLOCK and VERNIE MARIA SPURLOCK, his wife; and CHARLES PATRICK SPURLOCK and NANCY JENEEN SPURLOCK, his wife,

Plaintiffs,

vs.

SANTA FE PACIFIC RAILROAD COMPANY, an corporation,

Defendant.

JUDGMENT

(4998)

(Sand and Gravel)

The plaintiffs, Ransom Theodore Spurlock and Vernie Maria Spurlock, his wife; and Charles Patrick Spurlock and Nancy Jeneen Spurlock, his wife ("Spurlocks") brought an action against Santa Fe Pacific Railroad Company ("Santa Fe") to quiet title to the sand and gravel located on or beneath the land owned by the Spurlocks which land is located in Apache County, Arizona and is specifically described on the attached Exhibit A which is incorporated herein by reference thereto.

Among the many legal and factual issues presented was the interpretation and effect of a reservation clause which

appeared in the deeds executed by Santa Fe to the Spurlocks' predecessors in interest, to wit: Cowden Livestock Company, Grace Porter, and the partnership of Spurlock and Wetzler taken in the name of R.C. Spurlock and Georganna Spurlock which reservation clause appears on the attached Exhibit B.

Santa Fe admitted that the only interest it claimed in the sand and gravel located on the Exhibit A land was the right to take sand and gravel for railroad purposes under the second paragraph of the reservation clause on Exhibit B.

After an eight month jury trial the Court submitted a written interrogatory to the jury pursuant to Rule 39(1) ARCP on the advisory issue and general verdict forms. The Court reserved unto itself certain legal issues concerning the validity and enforceability of the reservation clause on the annexed Exhibit B.

The advisory issue submitted to the jury related to whether Santa Fe had abandoned any right it may have had under the reservation clause, Exhibit B, to take sand and gravel for railroad purposes from the Exhibit A land.

On June 20, 1981, the jury determined in response to the written interrogatory that Santa Fe had abandoned any right it may have had to take sand and gravel for railroad purposes.

The jury returned a general verdict quieting title to the sand and gravel located on or beneath the Exhibit A land in the Spurlocks.

After the jury returned its answer to the interrogatory and its general verdict the Court then ruled upon legal issues affecting the validity and enforceability of the reservation clause (Exhibit B) in its entirety. The effect of the Court's ruling on those issues was that the reservation clause is, as a matter of law, void and unenforce-

able in its entirety. The Court further ruled on September 30, 1981, that Santa Fe was the alter ego of Santa Fe Industries, its parent company, and that Santa Fe Industries received fraudulent transfer from Santa Fe.

On September 30, 1981, the Court entered an order finding that the advisory answer to the interrogatory submitted to the jury pursuant to Rule 39(1) ARCP was either consistent with, or not inconsistent with the Court's finding on the same issue of fact and entered an order adopting the answer. Also, on September 30, 1981, the Court further entered an order that the answer of the jury to the written interrogatory was not inconsistent with the general verdict and directed the entry of judgment thereon.

More than twenty (20) days prior to bringing the action to quiet the title to the sand and gravel and Spurlocks had requested Santa Fe to execute a quit claim deed thereto and tendered to Santa Fe Five Dollars ($5.00) for execution and delivery of the deed in compliance with A.R.S. § 12-1103.B but Santa Fe refused to execute the quit claim deed. After the trial of the case the Spurlocks filed a motion for the award of attorney's fees pursuant to A.R.S. § 12-1103.B. The Court ordered an evidentiary hearing to determine whether the Spurlocks were entitled to attorney's fees and the amount thereof. After the evidentiary hearing the Court read and considered extensive memoranda filed by the Spurlocks and Santa Fe. The Court then ruled that the Spurlocks were entitled to attorney's fees in the amount of One Hundred Twenty-Five Thousand Dollars ($125,000.00).

Now, therefore, the Court having heard and seen all of the evidence, and having heard and considered all of the arguments of counsel, and having read and considered all of the briefs and memoranda submitted by the parties and being fully advised in the premises:

IT IS ORDERED, ADJUDGED AND DECREED that the reservation clause which is set forth in the annexed

Exhibit B and which appears in the deeds to the Exhibit A land from Santa Fe to the Spurlocks' predecessors in interest is void and unenforceable in its entirety; and

IT IS FURTHERED ORDERED, ADJUDGED AND DECREED that Santa Fe has abandoned any right it may have had to take sand and gravel for railroad purposes; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Spurlocks are the owners of all of the sand and gravel located on or beneath the land described on the annexed Exhibit A and the title to such sand and gravel is hereby quieted in the Spurlocks and Santa Fe has no estate, title or interest therein, and the title to the sand and gravel in or under the land described in the attached Exhibit A is owned by the Spurlocks and any persons claiming by, under or through it, are barred and forever estopped from claiming or having any estate, title, interest or right in or to the sand and gravel in or under said land adverse to the Spurlocks.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Spurlocks have and recover judgment against Santa Fe in the sum of One Hundred Twenty-Five Thousand Dollars ($125,000.00) as and for attorney's fees, together with interest thereon at the rate of ten percent (10%) per annum from the date of this judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Spurlocks have and recover from Santa Fe all of their costs.

The Court expressly determining herewith that there is no just reason for delay expressly directs entry of the foregoing judgment.

DONE IN OPEN COURT this 24 day of May, 1982.

/s/ Paul G. Rosenblatt
THE HONORABLE PAUL G. ROSENBLATT
Judge of the Superior Court

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

Nos. 4779
4910
4936
4961
4949
4998

SANTA FE PACIFIC RAILROAD COMPANY, a corporation,
Plaintiff, and
Counterdefendant,

vs.

RANSOM THEODORE SPURLOCK and VERNIE MARIA SPURLOCK, his wife; and CHARLES PATRICK SPURLOCK and NANCY JENEEN SPURLOCK, his wife,
Defendants and
Counterclaimants.

JUDGMENT

(4910)

(Nitrogen)

The plaintiff and counterdefendant, Santa Fe Pacific Railroad Company ("Santa Fe") brought an action to quiet title to the nitrogen located on or beneath land owned by the defendants and counterclaimants, Ransom Theodore Spurlock and Vernie Maria Spurlock, his wife; and Charles Patrick Spurlock and Nancy Jeneen Spurlock, his wife, ("Spurlocks") which land is located in Apache County, Arizona and is specifically described on

the attached Exhibit A which is incorporated herein by reference thereto. The Spurlocks, in their counterclaim, sought to have the title to the nitrogen quieted in them.

Among the many legal and factual issues presented was the interpretation and effect of a reservation clause which appeared in the deeds executed by Santa Fe to the Spurlocks' predecessors in interest which reservation clause appears on the attached Exhibit B.

The Court ruled on August 22, 1977 that the re-entry clause contained in the first paragraph of the reservation clause set forth on Exhibit B violated the common law rule against restraints upon alienation and the rule against perpetuities.

After an eight month jury trial the Court submitted written interrogatories to the jury pursuant to Rule 39(1) ARCP on advisory issues and general verdict forms. The Court reserved unto itself certain legal issues concerning the validity and enforceability of the reservation clause on the annexed Exhibit B.

The interrogatories submitted to the jury related to whether the parties to the transactions between Santa Fe and the persons and entities from whom the Spurlocks had acquired the Exhibit A land by mesne conveyances, to-wit: Cowden Livestock Company, Grace Porter and the partnership of Spurlock and Wetzler taken in the name of R.C. Spurlock and Georganna Spurlock, ("Spurlocks' predecessors in interest") had a general or specific intent that Santa Fe was to be the owner of the nitrogen located on or beneath the land described on the annexed Exhibit A and whether there existed a custom and usage under which a reservation of "all oil, gas, coal and minerals whatsoever" reserved unto Santa Fe the nitrogen located on or beneath the lands described on the annexed Exhibit A.

On June 20, 1981 the jury determined in response to the written interrogatories that the parties to the trans-

actions between Santa Fe and the Spurlocks' predecessors in interest had no mutually agreed upon specific intent as to which of them would own the nitrogen but did have general intent that Santa Fe was not to own the nitrogen located on or beneath the Exhibit A land.

The jury further found, in its answers to written interrogatories, that the terms used in the reservation clause, Exhibit B, were terms for which there was a custom and usage and that the custom and usage existed both in 1947 and 1951, being the date of the agreements for sale and the deeds between Santa Fe and the Spurlocks' predecessors in interest. Further, the jury found, in response to the written interrogatories, that the custom and usage was applicable to the transactions between Santa Fe and the Spurlocks' predecessors in interest. Finally, the jury found, in the answers to written interrogatories that under the custom and usage which existed a reservation of "all oil, gas, coal and minerals whatsoever" could not reserve unto Santa Fe the nitrogen located on or beneath the Exhibit A land.

The jury returned a general verdict quieting title to the nitrogen located on or beneath the Exhibit A land in the Spurlocks.

After the jury returned its answers to interrogatories and its general verdict the Court then ruled upon legal issues affecting the validity and enforceability of the reservation clause (Exhibit B) in its entirety. The effect of the Court's ruling on those issues was that the reservation clause is, as a matter of law, void and unenforceable in its entirety.

On September 30, 1981 the Court entered an order finding that the advisory answers to the interrogatories submitted to the jury pursuant to Rule 39(1) ARCP were either consistent with, or not inconsistent with the Court's findings on the same issues of fact and entered

an order adopting the answers. Also, on September 30, 1981 the Court further entered an order that the answers of the jury to the written interrogatories were not inconsistent with the general verdict and directed the entry of judgment thereon.

Now, therefore, the Court having heard and seen all of the evidence, and having heard and considered all of the arguments of counsel and having read and considered all of the briefs and memorandum submitted by the parties and being fully advised in the premises:

IT IS ORDERED, ADJUDGED AND DECREED that the reservation clause which is set forth on the annexed Exhibit B and which appears in the deeds to the Exhibit A land from Santa Fe to the Spurlocks' predecessors in interest, is void and unenforceable in its entirety; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties to the deeds between Santa Fe and the Spurlocks' predecessors in interest had a mutually agreed upon general intent as to which of them would own the nitrogen located on or beneath the land described on Exhibit A and that the intended owner of the nitrogen was not Santa Fe; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the terms used in the reservation clause contained in the deeds between Santa Fe and the Spurlocks predecessors in interest were terms for which there was a custom and usage, which custom and usage existed both in 1947 and in 1951, and further, that the custom and usage was applicable to the transactions between Santa Fe and the Spurlocks' predecessors in interest; and, further that a reservation of "all oil, gas, coal and minerals whatsoever" did not reserve title to the nitrogen located on or beneath the land described on the attached Exhibit A; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the right of re-entry contained in the

first paragraph of the reservation clause (Exhibit B) contained in the deeds from Santa Fe to the Spurlocks' predecessors in interest violated the common law rule against restraints upon alienation and the rule against perpetuities and, is therefore, void; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Spurlocks are the owners of all of the nitrogen located on or beneath the land described on the annexed Exhibit A and the title to such nitrogen is hereby quieted in the Spurlocks and Santa Fe has no estate, title or interest therein, and the title to the nitrogen in or under the land described on the attached Exhibit A is owned by the Spurlocks free and clear of any claim or claims whatsoever of Santa Fe, and any persons claiming by, under or through it, are barred and forever estopped from claiming or having any estate, title, interest, or right in or to the nitrogen in or under said land adverse to the Spurlocks.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Spurlocks are awarded their costs herein.

The Court expressly determining herewith that there is no just reasons for delay expressly directs entry of the foregoing judgment.

DONE IN OPEN COURT this 24 day of May, 1982.

/s/ Paul G. Rosenblatt
PAUL G. ROSENBLATT
Judge of Superior Court

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF APACHE

Nos. 4779
4910
4936
4949
4961
4998

SANTA FE PACIFIC RAILROAD COMPANY, a corporation,
Plaintiff/Counterdefendant,

vs.

RANSOM THEODORE SPURLOCK and VERNIE MARIA SPURLOCK, his wife; and CHARLES PATRICK SPURLOCK and NANCY JENEEN SPURLOCK, his wife,
Defendants/Counterclaimants.

JUDGMENT

(4949)

(Petrified Wood)

The Plaintiff/Counterdefendant, SANTA FE PACIFIC RAILROAD COMPANY ("Santa Fe") brought an action to quiet title to the petrified wood located on or beneath land owned by the Defendants/Counterclaimants, RANSOM THEODORE SPURLOCK and VERNIE MARIA SPURLOCK, his wife; and CHARLES PATRICK SPURLOCK and NANCY JENEEN SPURLOCK, his wife, ("Spurlocks") which land is located in Apache

County, Arizona, and is specifically described on the attached Exhibit A which is incorporated herein by reference thereto. The Spurlocks, in their Counterclaim, sought to have the title to the petrified wood quieted to them.

Among the many legal and factual issues presented was the interpretation and effect of a reservation clause which appeared in the deeds executed by Santa Fe to the Spurlocks' predecessors in interest which reservation clause appears on the attached Exhibit B.

The Court ruled on August 22, 1977, that the re-entry clause contained in the first paragraph of the reservation clause set forth in Exhibit B violated the common law rule against restraints upon alienation and the rule against perpetuities.

After an eight month jury trial, the Court submitted written interrogatories to the jury, pursuant to Rule 39(1) Arizona Rules of Civil Procedure, on advisory issues and general verdict forms. The Court reserved unto itself certain legal issues concerning the validity and enforceability of the reservation clause on the annexed Exhibit B.

The advisory issues submitted to the jury related to whether the parties to the transactions between Santa Fe and the persons and entities from whom the Spurlocks had acquired the Exhibit A land by mesne conveyance, to-wit: Cowden Livestock Company, Grace Porter and the partnership of Spurlock and Wetzler taken in the name of R. C. Spurlock and Georganna Spurlock, ("Spurlocks' predecessors in interest") had a general or specific intent that Santa Fe was to be the owner of the petrified wood located on or beneath the land described in the annexed Exhibit A and whether there existed a custom and usage under which a reservation of "all oil, gas, coal and minerals whatsoever" reserved unto Santa Fe the petrified wood located on or beneath the land described on the annexed Exhibit A.

On June 20, 1981, the jury determined in response to the written interrogatories that the parties to the transactions between Santa Fe and the Spurlocks' predecessors in interest had a mutually agreed upon specific intent that Santa Fe was not to own the petrified wood located on or beneath the Exhibit A land.

The jury further found, in its answers to written interrogatories, that the terms used in the reservation clause, Exhibit B, were terms for which there was a custom and usage and that the custom and usage existed both in 1947 and 1951, being the dates of the agreements for sale and the deeds between Santa Fe and the Spurlocks' predecessors in interest. Further, the jury found, in response to the written interrogatories, that the custom and usage was applicable to the transactions between Santa Fe and the Spurlocks' predecessors in interest. Finally, the jury found in the answers to written interrogatories that under the custom and usage which existed a reservation of "all oil, gas, coal and minerals whatsoever" could not reserve unto Santa Fe the petrified wood located on or beneath the Exhibit A land.

The jury returned a general verdict quieting title to the petrified wood located on or beneath the Exhibit A land in the Spurlocks.

After the jury returned its answers to interrogatories and its general verdict, the Court then ruled upon legal issues affecting the validity and enforceability of the reservation clause (Exhibit B) in its entirety. The effect of the Court's ruling on those issues was that the reservation clause is, as a matter of law, void and unenforceable in its entirety.

On September 30, 1981, the Court entered an Order finding that the advisory answers to the interrogatories submitted to the jury pursuant to Rule 39(1), Arizona Rules of Civil Procedure, were either consistent with, or not inconsistent with the Court's findings on the same

issues of fact and entered an Order adopting the answers. Also, on September 30, 1981, the Court further entered an Order that the answers of the jury to the written interrogatories were not inconsistent with the general verdict and directed the entry of judgment thereon.

Now, therefore, the Court having heard and seen all of the evidence, and having heard and considered all of the arguments of counsel, and having read and considered all of the briefs and memoranda submitted by the parties, and being fully advised in the premises:

IT IS ORDERED, ADJUDGED AND DECREED that the reservation clause which is set forth on the annexed Exhibit B and which appears in the deeds to the Exhibit A land from Santa Fe, to the Spurlocks' predecessors in interest, is void and unenforceable in its entirety; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties to the deeds between Santa Fe and the Spurlocks' predecessors in interest had a mutually agreed upon specific intent as to which of them would own the petrified wood located on or beneath the land described on Exhibit A and that the intended owners of the petrified wood was not Santa Fe; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the terms used in the reservation clause contained in the deeds between Santa Fe and the Spurlocks' predecessors in interest were terms for which there was a custom and usage, which custom and usage existed both in 1947 and 1951, and further, that the custom and usage was applicable to the transactions between Santa Fe and the Spurlocks' predecessors in interest; and, under such custom and usage, a reservation of "all oil, gas, coal and minerals whatsoever" did not reserve title to the petrified wood located on or beneath the land described on the attached Exhibit A; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the right of reentry contained in the

first paragraph of the reservation clause (Exhibit B) contained in the deeds from Santa Fe to the Spurlocks' predecessors in interest violated the common law rule against restraints upon alienation and the rule against perpetuities and, is therefore void; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Spurlocks are the owners of all of the petrified wood located on or beneath the land described on the annexed Exhibit A and the title to such petrified wood is hereby quieted in the Spurlocks and Santa Fe has no estate, title or interest therein, and the title to the petrified wood in or under the land described in the attached Exhibit A is owned by the Spurlocks free and clear of any claim or claims whatsoever of Santa Fe and any persons claiming by, under or through it, are barred and forever estopped from claiming or having any estate, title, interest, or right in or to the petrified wood in or under said land adverse to the Spurlocks.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Spurlocks are awarded their costs incurred herein.

The Court expressly determining herewith that there is no just reason for delay expressly directs entry of the foregoing Judgment.

DONE IN OPEN COURT this 24 day of May, 1982.

/s/ Paul G. Rosenblatt
THE HONORABLE PAUL G. ROSENBLATT
Judge of the Superior Court

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

Nos. 4779
4910
4936
4949
4961
4998

SANTA FE PACIFIC RAILROAD COMPANY, a corporation,
Plaintiff and Counterdefendant,

vs.

RANSOM THEODORE SPURLOCK and VERNIE MARIA SPURLOCK, his wife; and CHARLES PATRICK SPURLOCK and NANCY JENEEN SPURLOCK, his wife,
Defendants and Counterclaimants.

JUDGMENT

(4961)

(Clay)

The plaintiff and counterdefendant, Santa Fe Pacific Railroad Company ("Santa Fe") brought an action to quiet title to the clay located on or beneath the land owned by the defendants and counterclaimants, Ransom Theodore Spurlock and Vernie Maria Spurlock, his wife; and Charles Patrick Spurlock and Nancy Jeneen Spurlock, his wife, ("Spurlocks") which land is located in Apache County, Arizona and is specifically described on the attached Exhibit A which is incorporated herein by reference thereto. The Spurlocks, in their counterclaim, sought to have the title to the clay quieted in them.

Among the many legal and factual issues presented was the interpretation and effect of a reservation clause which appeared in the deeds executed by Santa Fe to the Spurlocks' predecessors in interest which reservation clause appears on the attached Exhibit B.

The Court ruled on August 22, 1977, that the reentry clause contained in the first paragraph of the reservation clause set forth in Exhibit B violated the common law rule against restraints upon alienation and the rule against perpetuities.

After an eight month jury trial the Court submitted written interrogatories to the jury pursuant to Rule 39(1) ARCP on advisory issues and general verdict forms. The Court reserved unto itself certain legal issues concerning the validity and enforceability of the reservation clause on the annexed Exhibit B.

The interrogatories submitted to the jury related to whether the parties to the transactions between Santa Fe and the persons and entities from whom the Spurlocks had acquired the Exhibit A land by mesne conveyances, to-wit: Cowden Livestock Company, Grace Porter and the partnership of Spurlock and Wetzler taken in the name of R. C. Spurlock and Georganna Spurlock, ("Spurlocks' predecessors in interest") had a general or specific intent that Santa Fe was to be the owner of the clay located on or beneath the land described on the annexed Exhibit A and whether there existed a custom and usage under which a reservation of "all oil, gas, coal and minerals whatsoever" reserved unto Santa Fe the clay located on or beneath the land described on the annexed Exhibit A.

On June 20, 1981, the jury determined in response to the written interrogatories that the parties to the transactions between Santa Fe and the Spurlocks' predecessors in interest had a mutually agreed upon specific intent

that Santa Fe was not to own the clay located on or beneath the Exhibit A land.

The jury further found, in its answers to written interrogatories, that the terms used in the reservation clause, Exhibit B, were terms for which there was a custom and usage and that the custom and usage existed both in 1947 and 1951, being the date of the agreement for sale and the deeds between Santa Fe and the Spurlocks' predecessors in interest. Further the jury found, in response to the written interrogatories, that the custom and usage was applicable to the transactions between Santa Fe and the Spurlocks' predecessors in interest. Finally, the jury found, in the answers to written interrogatories, that under the custom and usage which existed a reservation of "all oil, gas, coal and minerals whatsoever" could not reserve unto Santa Fe the clay located on or beneath the Exhibit A land.

The jury returned a general verdict quieting title to the clay located on or beneath the Exhibit A land in the Spurlocks.

After the jury returned its answers to interrogatories and its general verdict the Court then ruled upon legal issues affecting the validity and enforceability of the reservation clause (Exhibit B) in its entirety. The effect of the Court's ruling on those issues was that the reservation clause is, as a matter of law, void and unenforceable in its entirety.

On September 30, 1981 the Court entered an order finding that the advisory answers to the interrogatories submitted to the jury pursuant to Rule 39(1) ARCP were either consistent with, or not inconsistent with the Court's findings on the same issues of fact and entered an order adopting the answers. Also, on September 30, 1981, the Court further entered an order that the answers to the jury to the written interrogatories were not inconsistent with the general verdict and directed the entry of judgment thereon.

Now, therefore, the Court having heard and seen all of the evidence, and having heard and considered all of the arguments of counsel and having read and considered all of the briefs and memoranda submitted by the parties and being fully advised in the premises:

IT IS ORDERED, ADJUDGED AND DECREED that the reservation clause which is set forth on the annexed Exhibit B and which appears in the deeds to the Exhibit A land from Santa Fe to the Spurlocks' predecessors in interest is void and unenforceable in its entirety; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties to the deeds between Santa Fe and the Spurlocks' predecessors in interest had a mutually agreed upon specific intent as to which of them would own the clay located on or beneath the land described on Exhibit A and that the intended owner of the clay was not Santa Fe; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the terms used in the reservation clause contained in the deeds between Santa Fe and the Spurlocks' predecessors in interest were terms for which there was a custom and usage, which custom and usage existed both in 1947 and in 1951, and further, that the custom and usage was applicable to the transactions between Santa Fe and the Spurlocks' predecessors in interest; and, further that a reservation of "all oil, gas, coal and minerals whatsoever" did not reserve title to the clay located on or beneath the land described on the attached Exhibit A; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the right of re-entry contained in the first paragraph of the reservation clause (Exhibit B) contained in the deeds from Santa Fe to the Spurlocks' predecessors in interest violated the common law rule against restraints upon alienation and the rule against perpetuities and, is therefore, void; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Spurlocks are the owners of all of the clay located on or beneath the land described on the annexed Exhibit A and the title to such clay is hereby quieted in the Spurlocks and Santa Fe has no estate, title or interest therein, and the title to the clay in or under the land described in the attached Exhibit A is owned by the Spurlocks free and clear of any claim or claims whatsoever of Santa Fe and any persons claiming by, under or through it, are barred and forever estopped from claiming or having any estate, title, interest, or right in or to the clay in or under said land adverse to the Spurlocks.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Spurlocks are awarded their costs incurred herein.

The Court expressly determined herewith that there is no just reason for delay expressly directs entry of the foregoing judgment.

DONE IN OPEN COURT this 24 day of May, 1982.

/s/ Paul G. Rosenblatt
PAUL G. ROSENBLATT
Judge of Superior Court

APPENDIX C

[SEAL]

SUPREME COURT
STATE OF ARIZONA
201 - West Wing
Capitol Building
(602) 255-4536
Phoenix 85007

January 30, 1985

RE: SPURLOCK et ux et al vs. SANTA FE PACIFIC RAILROAD COMPANY et al

Supreme Court No. 17849-PR

Court of Appeals No. 1 CA-CIV 6938

Apache County Nos. C-4779, C-4910, C-4936, C-4961, C-4949 & C-4998 (Consolidated)

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on January 29, 1985, in regard to the above-referenced cause:

"ORDERED: Petition for Review = DENIED.

Justices Gordon and Cameron did not participate in the determination of this matter."

Record returned to the Court of Appeals, Division One, Phoenix, this 30th day of January, 1985.

S. ALAN COOK, Clerk

To: Jack E. Evans, Esq.

Philip E. von Ammon, Esq., Donald R. Gilbert, Esq., and Timothy Berg, Esq., Fennemore, Craig, von Ammon, Udall & Powers

Robert L. Palmer, Esq., Ronald Kilgard, Esq., and James A. Bush, Esq., Martori, Meyer, Hendricks & Victor

Glen D. Clark, Clerk, Court of Appeals, Division One

eh

APPENDIX D

[SEAL]

SUPREME COURT
STATE OF ARIZONA
201 - West Wing
Capitol Building
(602) 255-4536
Phoenix 85007

March 6, 1985

RE: SPURLOCK vs. SANTA FE PACIFIC RAILROAD COMPANY et al

Supreme Court No. 17849-PR

Court of Appeals No. CA-CIV 6938

Apache County Nos. C-4779, C-4910, C-4936, C-4961, C-4949 & C-4998 (Consolidated)

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on March 5, 1985, in regard to the above-referenced cause:

"ORDERED: Petition to Recall Mandate = DENIED.

FURTHER ORDERED: Motion for Permission to file Motion for Reconsideration of Order Denying Petition for Review = DENIED.

FURTHER ORDERED: Motion for Reconsideration = DENIED as moot.

Justice Feldman voting to grant petition to recall mandate.

Justices Gordon and Cameron did not participate in the determination of this matter."

S. ALAN COOK, Clerk

To: Jack E. Evans, Esq., Jack E. Evans, Ltd.

Philip E. von Ammon, Esq., Donald R. Gilbert, Esq., and Timothy Berg, Esq., Fennemore, Craig, von Ammon, Udall & Powers

Robert L. Palmer, Esq., Ronald Kilgard, Esq., and James A. Bush, Esq., Martori, Meyer Hendricks & Victor

eh

APPENDIX E

[SEAL]

SUPREME COURT
STATE OF ARIZONA
201 - West Wing
Capitol Building
(602) 255-4536
Phoenix 85007

27 March 1985

RE: SPURLOCK et al vs. SANTA FE PACIFIC RAILROAD COMPANY et al

Supreme Court No. 17849-PR

Court of Appeals No. 1 CA-CIC 6938

Apache County Nos. C-4779, 4910, 4936, 4961, 4949 & 4998 (Consolidated)

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on March 26, 1985, in regard to the above-referenced cause:

"ORDERED: Motion for Reconsideration = DENIED.

Justices Gordon and Cameron did not participate in the determination of this matter."

S. ALAN COOK, Clerk

To: Jack E. Evans, Esq.

Philip E. von Ammon, Esq., Donald R. Gilbert, Esq., and Timothy Berg, Esq., Fennemore, Craig, von Ammon, Udall & Powers

Robert L. Palmer, Esq., Ronald Kilgard, Esq., and James A. Bush, Esq., Martori, Meyer, Hendricks & Victor

pgk

APPENDIX F

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Act of Congress of July 27, 1866, ch. 278, 14 Stat. 292, provides:

CHAP. CCLXXVIII.—*An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That John B. Brown, [*et al.*] * * *; and all such other persons who shall or may be associated with them, and their successors, are hereby created and erected into a body corporate and politic, in deed and in law, by the name, style, and title of the "Atlantic and Pacific Railroad Company," and by that name shall have perpetual succession, and shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States,

and may make and have a common seal. And said corporation is hereby authorized and empowered to lay out, locate, and construct, furnish, maintain, and enjoy, a continuous railroad and telegraph line, with the appurtenances, namely: Beginning at or near the town of Springfield, in the State of Missouri, thence to the western boundary line of said State, and thence by the most eligible railroad route as shall be determined by said company to a point on the Canadian River, thence to the town of Albuquerque, on the River Del Norte, and thence, by way of the Agua Frio, or other suitable pass, to the head-waters of the Colorado Chiquito, and thence, along the thirty-fifth parallel of latitude, as near as may be found most suitable for a railway route, to the Colorado River, at such point as may be *be* selected by said company for crossing; thence by the most practicable and eligible route, to the Pacific. The said company shall have the right to construct a branch from the point at which the road strikes the Canadian River eastwardly, along the most suitable route as selected, to a point in the western boundary line of Arkansas, at or near the town of Van Buren. And the said company is hereby vested with all the powers, privileges, and immunities necessary to carry into effect the purposes of this act, as herein set forth. The capital stock of said company shall consist of one million shares of one hundred dollars each, which shall in all respects be deemed personal property, and shall be transferable in such manner as the laws of said corporation shall provide. The persons hereinbefore named are hereby appointed commissioners, and shall be called the board of commissioners of the "Atlantic and Pacific Railroad Company," and fifteen shall constitute a quorum for the transaction of business. The first meeting of said board of commissioners shall be held at the Turner Hall, in the city of Saint Louis, on the first day of October, anno Domini eighteen hundred and sixty-six, or at such time within three months thereafter as any ten commissioners herein named from Missouri shall

appoint, notice of which shall be given by them to the other commissioners by publishing said notice in at least one daily newspaper in the cities of Boston, New York, Cincinnati, Saint Louis, Memphis, and Nashville, once a week for at least four weeks previous to the day of meeting. Said board shall organize by the choice from its number of a president, vice-president, secretary, and treasurer, and they shall require from said treasurer such bonds as may be deemed proper, and may from time to time increase the amount thereof, as they may deem proper. The secretary shall be sworn to the faithful performance of his duties, and such oath shall be entered upon the records of the company, signed by him, and the oath verified thereon. The president and secretary of said boards shall, in like manner, call all other meetings, naming the time and place thereof. It shall be the duty of said board of commissioners to open books, or cause books to be opened, at such times and in such principal cities or other places in the United States as they or a quorum of them shall determine, within twelve months after the passage of this act, to receive subscriptions to the capital stock of said corporation, and a cash payment of ten per centum on all subscriptions, and to receipt therefor. So soon as ten thousand shares shall in good faith be subscribed for, and ten dollars per share actually paid into the treasury of the company, the said president and secretary of said board of commissioners shall appoint a time and place for the first meeting of the subscribers to the stock of said company, and shall give notice thereof in at least one newspaper in each State in which subscription books have been opened, at least fifteen days previous to the day of meeting, and such subscribers as shall attend the meeting so called, either in person or by lawful proxy, then and there shall elect, by ballot, thirteen directors for said corporation; and in such election each share of said capital stock shall entitle the owner thereof to one vote. The president and secretary of the board of commissioners, and in case of

their absence or inability any two of the officers of said board, shall act as inspectors of said election, and shall certify, under their hands, the names of the directors elected at said meeting. And the said commissioners, treasurer, and secretary shall then deliver over to said directors all the moneys, properties, subscription books, and other books in their possession, and thereupon the duties of said commissioners and the officers previously appointed by them shall cease and determine forever, and thereafter the stockholders shall constitute said body politic and corporate. Annual meetings of the stockholders of the said corporation for the choice of officers, (when they are to be chosen.) and for the transaction of business, shall be holden at such time and place and upon such notice as may be prescribed in the by-laws.

SEC. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to the said Atlantic and Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station-buildings, workshops, depots, machine-shops, switches, side-tracks, turn-tables, and water-stations; and the right of way shall be exempt from taxation within the Territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act.

SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the Atlantic and Pacific Railroad

Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: *Provided*, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided further*, That the railroad company receiving the previous grant of land may assign their interest to said "Atlantic and Pacific Railroad Company," or may consolidate, confederate, and associate, with said company upon the terms named in the first and seventeenth sections of this act: *Provided further*, That all mineral lands be, and the same are hereby,

excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: *And provided further*, That the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided further*, That no money shall be drawn from the treasury of the United States to aid in the construction of the said "Atlantic and Pacific Railroad."

SEC. 4. *And be it further enacted*, That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath, to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid.

SEC. 5. *And be it further enacted*, That said Atlantic and Pacific Railroad shall be constructed in a substantial and workmanlike manner, with all the necessary

draws, culverts, bridges, viaducts, crossings, turn-outs, stations, and watering-places, and all other appurtenances, including furniture and rolling stock, equal in all respects to railroads of the first class when prepared for business, with rails of the best quality, manufactured from American iron. And a uniform guage shall be established throughout the entire length of the road. And there shall be constructed a telegraph line, of the most substantial and approved description, to be operated along the entire line: *Provided*, That the said company shall not charge the government higher rates than they do individuals for like transportation and telegraphic service. And it shall be the duty of the Atlantic and Pacific Railroad Company to permit any other railroad which shall be authoritzed to be built by the United States, or by the legislature of any Territory or State in which the same may be situated, to form running connections with it, on fair and equitable terms.

SEC. 6. *And be it further enacted*, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption, before or after they are surveyed except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company.

SEC. 7. *And be it further enacted*, That the said Atlantic and Pacific Railroad Company be, and is hereby, author-

ized and empowered to enter upon, purchase, take, and hold any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width one hundred feet on each side of the line of its railroad, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turn-outs, standing places for cars, depots, station-houses, or any other structures required in the construction and working of said road. And the said company shall have the right to cut and remove trees and other material that might, by falling, encumber its road-bed, though standing or being more than two hundred feet from the line of said road. And in case the owner of such lands or premises and the said company cannot agree as to the value of the premises taken, or to be taken, for the use of said road, the value thereof shall be determined by the appraisal of three disinterested commissioners, who may be appointed upon application by either party to any court of record in any of the Territories in which the lands or premises to be taken lie; and said commissioners, in their assessment of damages, shall appraise such premises at what would have been the value thereof if the road had not been built. And upon return into court of such appraisement, and upon the payment into the same of the estimated value of the premises taken for the use and benefit of the owner thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid. And either party feeling aggrieved at said appraisement may, within thirty days after the same has been returned into court, file an appeal therefrom, and demand a jury of twelve men to estimate the damage sustained; but such appeal shall not interfere with the rights of said company to enter upon the premises taken, or to do any act necessary and proper in the construction of its road. And said party appealing shall give bonds, with sufficient surety or sureties, for the payment of any cost that may arise upon

such appeal; and in case the party appealing does not obtain a verdict more favorable, such party shall pay the whole cost incurred by the appellee, as well as his own, and the payment into court, for the use of the owner of said premises taken, at a sum equal to that finally awarded, shall be held to vest in said company the title of said land, and the right to use and occupy the same for the construction, maintenance, and operation of said road. And in case any of the lands to be taken as aforesaid shall be held by an infant, femme covert, non compos, insane person, or persons residing without the Territory within which the lands to be taken lie, or persons subjected to any legal disability, the court may appoint a guardian, for any party under any disqualification, to appear in proper person, who shall give bonds, with sufficient surety or sureties, for the proper and faithful execution of his trust, and who may represent in court the person disqualified, as aforesaid, from appearing, when the same proceedings shall be had in reference to the appraisement of the premises to be taken for the use of said company, and with the same effect as has been already described; and the title of the company to the lands taken by virtue of this act shall not be affected or impaired by reason of any failuure by any guardian to discharge faithfully his trust. And in case any party shall have a right or claim to any land for a term of years, or any interest therein, in possession, reversion, or remainder, the value of any such estate, less than a fee simple, shall be estimated and determined in the manner hereinbefore set forth. And in case it shall be necessary for the company to enter upon any lands which are unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purposes of said railroad, and may institute proceedings, in manner described, for the purpose of ascertaining the value of, and of acquiring a title to, the same; but the judge of the court hearing said suit shall determine the kinds of notice to be served on such owner or owners, and he may in his discretion appoint

an agent or guardian to represent such owner or owners in case of his or their incapacity or non-appearance. But in case no claimant shall appear within six years from the time of the opening of said road across any land, all claims to damages against said company shall be barred.

SEC. 8. *And be it further enacted*, That each and every grant, right, and privilege herein are so made and given to and accepted by said Atlantic and Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the main line of the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-eight.

SEC. 9. *And be it further enacted*, That the United States make the several conditional grants herein, and that the said Atlantic and Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.

SEC. 10. *And be it further enacted*, That all people of the United States shall have the right to subscribe to the stock of the Atlantic and Pacific Railroad Company until the whole capital named in this act of incorporation is taken up by complying with the terms of subscription.

SEC. 11. *And be it further enacted*, That said Atlantic and Pacific Railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval, and all other government service, and also subject to such regulations as Congress may impose restricting the charges for such government transportation.

SEC. 12. *And be it further enacted,* That the acceptance of the terms, conditions, and impositions of this act by the said Atlantic and Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterwards, and shall be deposited in the office of the Secretary of the Interior.

SEC. 13. *And be it further enacted,* That the directors of said company shall make and publish an annual report of their proceedings and expenditures, verified by the affidavits of the president and at least six of the directors, a copy of which shall be deposited in the office of said Secretary of the Interior, and they shall, from time to time, fix, determine, and regulate the fares, tolls, and charges to be received and paid for transportation of persons and property on said road, or any part thereof.

SEC. 14. *And be it further enacted,* That the directors chosen in pursuance of the first section of this act, shall, so soon, as may be after their election, elect from their own number a president and vice-president; and said board of directors shall, from time to time, and so soon as may be after their election, choose a treasurer and secretary, who shall hold their offices at the will and pleasure of the board of directors. The treasurer and secretary shall give such bonds, with such security as the said board from time to time may require. The secretary shall, before entering upon his duty, be sworn to the faithful discharge thereof, and said oath shall be made a matter of record upon the books of said corporation. No person shall be a director of said company unless he shall be a stockholder, and qualified to vote for directors at the election at which he shall be chosen.

SEC. 15. *And be it further enacted,* That the president, vice-president, and directors shall hold their offices for

the period indicated in the by-laws of said company, not exceeding three years, respectively, and until others are chosen in their place, and qualified. In case it shall so happen that an election of directors shall not be made on any day appointed by the by-laws of said company, the corporation shall not for that excuse be deemed to be dissolved, but such election may be holden on any day which shall be appointed by the directors. The directors, of whom seven, including the president, shall be a quorum for the transaction of business, shall have full power to make and prescribe such by-laws, rules, and regulations as they shall deem needful and proper touching the disposition and management of the stock, property, estate, and effects of the company, the transfer of shares, the duties and conduct of their officers and servants touching the election and meeting of the directors, and all matters whatsoever which may appertain to the concerns of said company; and the said board of directors may have full power to fill any vacancy or vacancies that may occur from any cause or causes from time to time in their said board. And the said board of directors shall have power to appoint such engineers, agents, and subordinates as may from time to time be necessary to carry into effect the object of the company, and to do all acts and things touching the location and construction of said road.

SEC. 16. *And be it further enacted*, That it shall be lawful for the directors of said company to require payment of the sum of ten per centum cash assessment upon all subscriptions received of all subscribers, and the balance thereof at such times and in such proportions and on such conditions as they shall deem to be necessary to complete the said road and telegraph lines within the time in this act prescribed. Sixty days' previous notice shall be given of the payments required, and of the time and place of payment, by publishing a notice once a week in one daily newspaper in each of the cities of Boston,

New York, Cincinnati, Saint Louis, Memphis, and Nashville, and in case any stockholder shall neglect or refuse to pay, in pursuance of such notice, the stock held by such person shall be forfeited absolutely to the use of the company, and also any payment or payments that shall have been made on account thereof, subject to the condition that the board of directors may allow the redemption on such terms as they may prescribe.

SEC. 17. *And be it further enacted*, That the said company is authorized to accept to its own use any grant, donation, loan, power, franchise, aid, or assistance which may be granted to or conferred on said company by the Congress of the United States, by the legislature of any State, or by any corporation, person, or persons, or by any Indian tribe or nation through whose reservation the road herein provided for may pass; and said corporation is authorized to hold and enjoy any such grant, donation, loan, power, franchise, aid, or assistance, to its own use, for the purpose aforesaid: *Provided*, That any such grant or donation, power, aid, or assistance from any Indian tribe or nation shall be subject to the approval of the President of the United States.

SEC. 18. *And be it further enacted*, That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for.

SEC. 19. *And be it further enacted*, That unless the said Atlantic and Pacific Railroad Company shall obtain

bona fide subscriptions to the stock of said company to the amount of one million of dollars, with ten per centum paid, within two years after the passage of and approval of this act, it shall be null and void.

SEC. 20. *And be it further enacted*, That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph, and keeping the same in working order, and to secure to the government at all times, but particularly in time of war, the use and benefits of the same for postal, military, and other purposes, Congress may, at any time, having due regard for the rights of said Atlantic and Pacific Railroad Company, add to, alter, amend, or repeal this act.

SEC. 21. *And be it further enacted*, That whenever in any grant of land or other subsidies, made or hereafter to be made, to railroads or other corporations, the United States has reserved the right, or shall reserve it, to appoint directors, engineers, commissioners or other agents to examine said roads, or act in conjunction with other officers of said company or companies, all the costs, charges, and pay of said directors, engineers, commissioners, or agents, shall be paid by the respective companies. Said directors, engineers, commissioners, or agents shall be paid for said services the sum of ten dollars per day, for each and every day actually and necessarily employed, and ten cents per mile for each and every mile actually and necessarily travelled, in discharging the duties required of them, which per diem and mileage shall be in full compensation for said services. And in case any company shall refuse or neglect to make such payment, no more patents for lands or other subsidies shall be issued to said company until these requirements are complied with.

APPROVED, July 27, 1866.

The Act of Congress of April 20, 1871, ch. 33, 17 Stat. 19, provides:

CHAP. XXXIII.—*An Act to enable the Atlantic and Pacific Railroad Company to mortgage its Road.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Atlantic and Pacific Railroad Company, organized under act of Congress of July twenty-seven, eighteen hundred and sixty six, is hereby authorized to make and issue its bonds in such form and manner, for such sums, payable at such times, and bearing such rate of interest, and to dispose of them on such terms as its directors may deem advisable; and to secure said bonds, the said company may mortgage its road, equipment, lands, franchises, privileges, and other rights and property, subject to such terms, conditions, and limitations as its directors may prescribe. As proof and notice of the legal execution and effectual delivery of any mortgage hereafter made by said company, it shall be filed and recorded in the office of the Secretary of the Interior: *Provided,* That if the company shall hereafter suffer any breach of the conditions of the act above referred to, under which it is organized, the rights of those claiming under any mortgage made by the company to the lands granted to it by said act shall extend only to so much thereof as shall be coterminous with or appertain to that part of said road which shall have been constructed at the time of foreclosure of said mortgage.

APPROVED, April 20, 1871.

The Act of Congress of March 3, 1897, ch. 374, 29 Stat. 622, provides:

CHAP. 374.—An Act To define the rights of purchasers under mortgages authorized by an Act of Congress approved April twentieth, eighteen hundred and seventy-

one, concerning the Atlantic and Pacific Railroad Company.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever any mortgage made by the Atlantic and Pacific Railroad under and by virtue of Acts of Congress is foreclosed in any court of the United States or of any State or Territory thereof, and any sale of the road, equipment, lands, franchises, privileges, and other rights and property covered by said mortgage is made under a decree or decrees of such courts, the purchaser at any such sale or sales, and their associates or assigns, shall constitute a new company, which shall have and shall be entitled to hold and possess the franchises and property so sold, and to exercise the same rights, powers, privileges, grants, and franchises, including the franchise to be a corporation, granted by the Act of Congress approved July twenty-seventh, eighteen hundred and sixty-six, incorporating the Atlantic and Pacific Railroad Company, and by acts amendatory thereof and supplemental thereto, which were owned and possessed by said Atlantic and Pacific Railroad Company, or said mortgagees at the time of such decree of foreclosure; and the incorporation as hereby provided shall be completed and become effective whenever the said purchasers and their associates or assigns shall file with the Secretary of the Interior a certificate of incorporation hereunder, duly acknowledged, specifying the name of such new corporation, its president, and the names of its directors, the amount of its proposed capital stock and bonds, together with certified copy of the decree or decrees ratifying such sale; but such new company shall be subject to all the obligations and duties to the United States which said Atlantic and Pacific Railroad Company was subject under its charter or Act of incorporation, and nothing in this Act shall be held to deprive the United States of any right or remedy they may at any time have had

against said Atlantic and Pacific Railroad Company; but nothing in this Act shall make such purchasers and their associates or such new corporation liable for any debts or claims or contracts of the old corporation except all debts, demands and liabilities which were due or owing by the old company, which were contracted, accrued, or were incurred or are due or owing for tickets and freight balances, or for wages, work, labor, materials, machinery, fixtures, and supplies of every kind and character, done, performed, or furnished in the repair, equipment, operation, or extension of said road and its branches so purchased, and all liabilities incurred by said old company in the transportation of freight and passengers thereon, including damages for injuries to employees or other persons, and to property, and which debts, demands and liabilities have accrued or upon which such had been brought or was pending, or judgment rendered, within twelve months prior to the appointment of a receiver or receivers in the foreclosure proceeding or since the appointment of any such receiver, but such liabilities shall not include any liabilities to other railroad companies except for tickets and freight balances: *Provided*, The capital stock of the corporation herein authorized shall be divided into shares each of the par value of one hundred dollars, and shall not exceed the amount of the mortgage debt due and unpaid at the time of the decree of foreclosure: *Provided*, That additional stock and bonds may be issued by the corporation upon the payment into its treasury therefor the full par value thereof in cash. No stock shall be issued until the Secretary of the Interior shall approve its issue and certify that it is issued in conformity to the provisions of this Act. The total stock issued under the provisions of this Act shall not exceed one hundred million dollars. But no stock shall be issued by said corporation, until such issue shall be approved by the Secretary of the Interior as actually representing money, labor or property, estimated at its actual cost value, at the full or par value of said issue of stock:

Provided further, That nothing herein contained shall be construed as making any additional grant of lands or other franchises to such successor corporation, or as a waiver of any rights of the United States now existing to enforce any forefeiture of lands heretofore granted to the said Atlantic and Pacific Railroad Company, or as in any manner affecting the vested rights of any settler or settlers on any of the lands heretofore granted to the Atlantic and Pacific Railroad Company or of any purchaser or purchasers of said lands from said company: *Provided further*, That as a condition precedent to reorganization the purchasers of the railroad property and their associates shall relinquish in writing and convey to the United States (by a proper deed or instrument to be filed with and approved by the Secretary of the Interior within six months after the passage of this Act and before this Act shall take effect) all claim, right, title, and interest to all lands granted to the Atlantic and Pacific Railroad Company embraced within both the granted and indemnity limits, which were adjacent to and coterminous with the uncompleted portions of the road on the sixth day of July, eighteen hundred and eighty-six: *And provided further*, That in every case of failure of the title to any lands conveyed or contracted to be sold by said Atlantic and Pacific Railroad Company to any bona fide settler and occupant in a tract of six hundred and forty acres or less any and all rights of such purchaser or his assigns, in respect of such land, or in respect of the failure of such title, or in respect to the liability of said Atlantic and Pacific Railroad Company on any such contract, shall survive and may be enforced against such successor company with the same force and effect and in the same manner as against the Atlantic and Pacific Railroad Company; and such successor company, upon making compensation for such loss of title or failure to comply with the conditions of any such land contract, shall be subrogated to the rights of such purchaser in respect of the lands for which such compensa-

tion shall have been made: *And provided further*, That in case any uncompleted contracts for the purchase of said land shall be pending at the time of such foreclosure sale, such new company shall, upon payment to it of any unpaid balance of purchase money for such land at the time provided in such contracts for the sale thereof, convey and release to the holders of such contracts all its title, interest, and estate in and to the land embraced in such contracts.

SEC. 2. Where the line of such railway is now located within the limits of any state, or where such line is now located within a territory which may hereafter become a state, such state or such territory, when it shall become a state, shall be empowered to require such corporation to become incorporated within such state or states as may be provided by the laws thereof.

SEC. 3. That Congress shall at all times have the power to alter, amend, or repeal this Act.

APPROVED, March 3, 1897.

The Act of Congress of June 27, 1902, Pub. L. No. 177, 32 Stat. 405, provides:

CHAP. 1159.—An Act Authorizing the Santa Fe Pacific Railroad Company to sell or lease its railroad property and franchises, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Santa Fe Pacific Railroad Company, a corporation incorporated under the Act of Congress, approved March third, eighteen hundred and ninety-seven, entitled "An Act to define the rights of purchasers under mortgages authorized by an Act of Congress approved April twentieth, eighteen hundred and seventy-one, concerning the Atlantic and Pacific Railroad Company," be, and it hereby is, authorized and empowered to sell or lease

its railroad and other property, including all rights, powers, privileges, grants, and franchises, to the Atchison, Topeka and Santa Fe Railway Company, a corporation of the State of Kansas, its successors and assigns; but such purchaser or lessee shall take, hold, and use the railroad and property sold or leased subject to all duties, obligations, conditions, and restrictions relating thereto which at the time of such sale or lease shall be binding upon said Santa Fe Pacific Railroad Company as fully as though such sale or lease had not been made; and thereupon such purchaser or lessee shall have and enjoy all rights, powers, privileges, grants, and franchises relating to said railroad and property, or any part thereof, that were conferred by Congress upon said Santa Fe Pacific Railroad Company: *Provided*, however, That said railroad shall remain as heretofore a post route and military road, subject to the use of the United States for postal, military, naval, and all other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation, and subject also to all other rights of the United States.

SEC. 2. That from and after the passage of this Act the said Santa Fe Pacific Railroad Company, its successors or assigns, shall pay an annual tax at the rate of one hundred and seventy-five dollars per mile to the Territories of New Mexico and Arizona, respectively, for each mile of main track in said Territories, respectively, the same to be apportioned among the counties of said Territories in which said railroad is located according to the mileage in each county, respectively, and said taxes shall be in lieu of all other taxes on said property hereby authorized to be leased or sold and the rolling stock used thereon, but excepting the land-grant lands and the shops as hereinafter otherwise provided, and the payment of the said tax as to each Territory shall be made on or before the first day of December of every year after nineteen hundred and two, until it shall have been admitted into

the United States of America as a State: and that upon the admission of the said Territories of New Mexico and Arizona, or either of them, as States, the property hereby authorized to be transferred, situated therein, shall be subject to all the laws and regulations of either of the said States of New Mexico or Arizona in the same maner and to the same extent as any other railroad property situated therein. The payment of the said one hundred and seventy-five dollars a mile shall not extend to or apply to any of the land-grant lands owned by the said Santa Fe Pacific Railroad Company which are in no wise connected with the right of way and station grounds of said company, said land-grant lands to remain as now chargeable with taxes as assessed and collected under and by virtue of the laws of the said Territories of New Mexico and Arizona, and the shops situated at Albuquerque, New Mexico, including the machinery therein, and the lands upon which the same are situated, shall be assessed separately, and the taxes thereon paid annually according to the laws of New Mexico.

SEC. 3. That the sale or lease herein authorized shall be made on or before January first, nineteen hundred and four: otherwise this Act shall become inoperative for all purposes.

SEC. 4. That Congress shall at all times have power to alter, amend, or repeal this Act.

Approved, June 27, 1902.

Section 321 of the Transportation Act of 1940, Pub. L. No. 785, 54 Stat. 954-55, as originally promulgated, provided:

SEC. 321. (a) Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be

paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty; and the rate determined by the Interstate Commerce Commission as reasonable therefor shall be paid for the transportation by railroad of the United States mail: *Provided, however,* That any carrier by railroad and the United States may enter into contracts for the transportation of the United States mail for less than such rate: *Provided further,* That section 3709, Revised Statutes (U.S.C., 1934 edition, title 41, sec. 5), shall not hereafter be construed as requiring advertising for bids in connection with the procurement of transportation services when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed.

(b) If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in

interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law.

Section 321 of the Transportation Act of 1940, as amended by Act of December 12, 1945, Pub. L. No. 256, 59 Stat. 606 (codified as amended at 49 U.S.C. § 10721 (1982)), provides:

(a) Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, and the rate determined by the Interstate Commerce Commission as reasonable therefor shall be paid for the transportation by railroad of the United States mail: *Provided, however,* That any carrier by railroad and the United States may enter into contracts for the transportation of the United States mail for less than such rate: *Provided further,* That section 3709, Revised Statutes (U.S.C., 1934 edition, title 41, sec. 5), shall not hereafter be construed as requiring advertising for bids in connection with the procurement of transpor-

tation services when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed."

Sec. 2. The amendment made by section 1 of this Act shall take effect October 1, 1946: *Provided, however,* That any travel or transportation specifically contracted for prior to such effective date shall be paid for at the rate, fare, or charge in effect at the time of entering into such contract of carriage or shipment.

Sec. 3. The Interstate Commerce Commission, in the exercise of its power to prescribe just and reasonable rates, fares, and charges, shall give due consideration to the increased revenues which carriers will receive as a result of the enactment of this Act, so that such increased revenues will be reflected in appropriate readjustments in rates, fares, and charges to shippers.

Approved December 12, 1945.

APPENDIX G

New York, September 10, 1902.

A meeting of the Board of Directors of the Santa Fe Pacific Railroad Company was held at 12 o'clock M., this day.

There were present Messrs Ripley, Morawetz, Berwind, Cheney, Duval, Fowler, Gleed, Haven, Hayes, McCullough and Smith. (11)

President Ripley presided and Secretary Deming acted as Secretary of the meeting.

Approval of Minutes.

The minutes of the meeting of the Board of Directors held on August 6, 1902 were read aloud, and on motion duly made and seconded were approved.

Acceptance of Act of Congress, June 27, 1902, authorizing sale of property.

On motion duly made and seconded, it was

VOTED, that the Santa Fe Pacific Railroad Company hereby accepts the Act of Congress, approved June 27, 1902, entitled: "An Act authorizing the Santa Fe Pacific Railroad Company to sell or lease its railroad, property and franchises and for other purposes."

Approval of agreement for sale of property to The A.T. & S.F. Ry. Co.

An agreement dated June 30, 1902 was submitted between this Company, party of the first part, and The Atchison, Topeka and Santa Fe Railway Company, party of the second part, whereby this Company agrees to convey its property to The Atchison, Topeka and Santa Fe Railway Company and gives the right to use and operate the same on and after July 1, 1902.

On motion duly made and seconded, it was

VOTED, that the said agreement be approved and that the same be executed by the President in behalf of this Company and the corporate seal attested by the Secretary.

There being no further business, on motion the meeting was adjourned.

/s/ L. C. Deming
Secretary.

APPENDIX H

New York, May 6, 1903.

A meeting of the Board of Directors of the Santa Fe Pacific Railroad Company was held at 11:30 o'clock A.M. this day.

There were present Messrs Berwind, Cheney, Haven, McCullough, Morawetz, Smith and Steele. (7)

Upon motion, Mr. Haven presided and Secretary Deming acted as Secretary of the meeting.

Approval of Board Minutes Feb. 16, 1903.

The minutes of the meeting of the Board of Directors held on February 16, 1903 were read aloud and on motion duly made and seconded were approved.

Land Grant Lands. Approval of Deed of Conveyance to Santa Fe Pacific Development Co.

The General Counsel submitted a form of proposed deed to be executed by this Company conveying all its land grant lands to the Santa Fe Pacific Development Company, a corporation, all the stock of which, except the qualifying shares of Directors, is owned by this Company.

On motion duly made and seconded, it was

VOTED, that the execution of a deed substantially of the tenor of the draft now submitted conveying to the Santa Fe Pacific Development Company the lands and rights of this Company under Section 3 of the Act of Congress approved July 27, 1866 entitled "An Act to aid in the construction of a railroad and telegraph line from the States of Missouri and Kansas to the Pacific Coast," be and the same hereby is approved.

L.C.D.

Approval of Deed of Conveyance of Railroad & Property to the A.T. & S.F. Ry. Co.

The General Counsel also submitted a form of deed from this Company conveying to The Atchison, Topeka and Santa Fe Railway Company, as authorized by the Act of Congress of June 27, 1902, all the railroad and other property, including rights, powers, privileges, grants and franchises of this Company.

On motion duly made and seconded, it was

VOTED, that the execution of a deed substantially in the form now submitted conveying all the railroad and other property, including all rights, powers, privileges, grants and franchises of this Company to The Atchison, Topeka and Santa Fe Railway Company be approved, and that the officers of this Company be authorized to do all things necessary to carry the same into effect; it being understood that such deed is to be executed after the execution by this Company of a deed substantially in the form heretofore approved by this Board conveying to the Santa Fe Pacific Development Company the land grants of this Company.

There being no further business, on motion the meeting was adjourned.

/s/ L. C. Deming
Secretary

APPENDIX I

THIS INDENTURE, Made this 30th day of May, in the year One Thousand Nine Hundred and Three, by and between the SANTA FE PACIFIC RAILROAD COMPANY, (hereinafter the Santa Fe Pacific Company), a corporation created under and by virtue of an Act of Congress approved March 3, 1897, party of the first part, and the SANTA FE PACIFIC DEVELOPMENT COMPANY, (hereinafter called the Development Company), a corporation created under and by virtue of the laws of the State of California, party of the second part.

Whereas, by the Act of Congress approved July 27, 1866, entitled: "An Act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast," the Atlantic and Pacific Railroad Company was incorporated; and by section 2 of said act there was granted to said Atlantic and Pacific Railroad Company for the construction of a railroad and telegraph line, as proposed, the right of way through the public lands to the extent of one hundred feet in width on each side of said railroad where the same may pass through the public domain, including all necessary grounds for station buildings, work shops, depots, machine shops, switches, sidetracks, turn-tables and water stations; and

Whereas, by section 3 of said Act of Congress there was granted to said Atlantic and Pacific Railroad Company for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, the alternate sections of public lands, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as in said section 3 provided; and

Whereas, thereafter said Atlantic and Pacific Railroad Company executed its certain mortgages or deeds

of trust, whereby it mortgaged and conveyed to the trustees therein named respectively, its railroad and telegraph line known as the Western Division of the Atlantic and Pacific Railroad, beginning at Albuquerque on the Rio Grande River, in the Territory of New Mexico, and thence extending to the Colorado River and thence by the most practicable and eligible route to the Pacific Ocean, together with its franchises, privileges and other rights and all other property of every description composing or pertaining to the said railroad and telegraph line, including the lands and rights granted to said Atlantic and Pacific Railroad Company by the aforesaid section 3 of said Act of Congress; and

Whereas, in certain causes thereafter instituted and pending in the courts of New Mexico, Arizona and California for the foreclosure of said mortgages or deeds of trust, such proceedings were had that the said railroad and telegraph line, franchises, privileges and other rights and all other property of every description pertaining to the said railroad and telegraph line, and also the lands and rights granted to said Atlantic and Pacific Railroad Company by said section 3 of said Act of Congress, were sold in pursuance of decrees entered in said causes, and such sale having been duly confirmed by said courts, were conveyed by Owen N. Marron, the special master appointed by said courts, unto Aldace F. Walker, R. Somers Hayes and Victor Morawetz, by deed dated the second day of June, 1897; and

Whereas, said Aldace F. Walker, R. Somers Hayes and Victor Morawetz accepted the provisions of the Act of Congress approved March 3, A.D. 1897, entitled: "An Act to define the rights of purchasers under mortgages authorized by an act of Congress approved April twentieth, eighteen hundred and seventy-one, concerning the Atlantic and Pacific Railroad Company," and, by a proper deed or instrument filed with and approved by the Secretary of the Interior, as prescribed by said Act of

Congress, relinquished and conveyed to the United States of America all their claim, right, title and interest to all lands granted by the United States of America to the Atlantic and Pacific Railroad Company embraced both within the granted and indemnity limits which were adjacent to and coterminous with the uncompleted portions of said railroad of the Atlantic and Pacific Railroad Company on the 6th day of July, 1886; and

Whereas, said purchasers, Aldace F. Walker, R. Somers Hayes and Victor Morawetz, in accordance with said Act of Congress approved March 3, A.D. 1897, duly organized and constituted the Santa Fe Pacific Company, party of the first part hereto; and by deed dated the 24th day of June, A.D. 1897, duly conveyed to the Santa Fe Pacific Company all and singular all the said right, title and interest acquired by them in and to the said railroad and telegraph line, franchises, privileges and other rights and property of every description composing or pertaining to said railroad and telegraph line, including said lands and rights granted to said Atlantic and Pacific Railroad Company by said section 3 of said Act of Congress approved July 27, 1866, excepting, however, the claim, right, title and interest theretofore relinquished and conveyed by them, as aforesaid, to the United States of America; and

Whereas, thereafter by a certain deed dated December 24, 1898, Edward Wilder conveyed to the Santa Fe Pacific Company certain lands which theretofore had been granted to said Atlantic and Pacific Railroad Company by the aforesaid Act of Congress approved July 27, 1866, such lands having been theretofore sold and conveyed by the Atlantic and Pacific Railroad Company to George F. Crane and the title thereto having been acquired by the said Edward Wilder:

Now Therefore, This Indenture Witnesseth, that for and in consideration of the sum of One Dollar ($1) to it duly paid by the Development Company, at or before

the ensealing and delivery of these presents and of other valuable considerations, the receipt whereof is hereby acknowledged, the Santa Fe Pacific Company has granted, bargained, sold, assigned, released, conveyed confirmed and set over and by these presents does grant, bargain, sell, assign, release, convey, confirm and set over to the Development Company, its successors and assigns forever, all the right, title, interest, claim and demand of the Santa Fe Pacific Company in and to all lands, and all rights which were granted to the Atlantic and Pacific Railroad Company under and by virtue of said Section 3 of said Act of Congress approved July 27, 1866, including all lands for which patents have been granted or for which patents may hereafter be granted, whether such lands have been selected or surveyed or may hereafter be selected or surveyed, and whether such lands be located within the limits specifically designated in said Section 3 of said Act of Congress approved July 27, 1866, or be lands selected in lieu thereof not more than ten (10) miles beyond said limits; and including all lands to which the Santa Fe Pacific Company is or may be entitled to receive by way of indemnity in lieu of lands, within its place or indemnity limits, hereby conveyed;

EXCEPTING, HOWEVER, FROM THIS GRANT AND RESERVING unto the Santa Fe Pacific Company all the following described lands, viz:

The southeast quarter (S.E. ¼) of the northeast quarter (N.E. ¼) and the northeast quarter (N.E. ¼) of the southeast quarter (S.E. ¼) of Section six (6), Township twelve (12) north, Range eleven (11) west, New Mexico Base and Meridian, containing eighty (80) acres, in Valencia County, New Mexico Territory;

The southeast quarter (S.E. ¼) of the southwest quarter (S.W. ¼) of Section eight (8), Township eighteen (18) north, Range twenty-four (24) east, Gila

and Salt River Base and Meridian, containing forty (40) acres, in Apache County, Arizona Territory;

The northwest quarter (N.W. ¼) of Section twenty-one (21), Township eighteen (18) north, Range sixteen (16) east, Gila and Salt River Base and Meridian, in Navajo County, Arizona Territory;

Sections twenty-nine (29) and thirty-one (31), in Township twenty-one (21) north, Range nine (9) east, Gila and Salt River Base and Meridian, in Coconino County, Arizona Territory;

Section nineteen (19), Township twenty (20) north, Range seven (7) east, Gila and Salt River Base and Meridian, in Coconino County, Arizona Territory;

Section fifteen (15), in Township nineteen (19) north, Range six (6) east, Gila and Salt River Base and Meridian, in Coconino County, Arizona Territory;

Section eleven (11), and thirty-two and seventy-seven one-hundredths (32.77) acres in the northeast quarter (N.E. ¼) of Section ten (10), in Township twenty-one (21) north, Range five (5) east, Gila and Salt River Base and Meridian, in Coconino County, Arizona Territory;

The northeast quarter (N.E. ¼) of Section one (1), in Township twenty-one (21) north, Range three (3) east, Gila and Salt River Base and Meridian, in Coconino County, Arizona Territory;

The west half (W. ½) of the southeast quarter (S.E. ¼) of Section thirty-three (33), in Township twenty-two (22) north, Range two (2) east, of the Gila and Salt River Base and Meridian, containing eighty (80) acres, and a part of the southwest quarter (S.W. ¼) of Section thirty-three (33), Township twenty-two (22) north, Range two (2) east of the Gila and Salt River Base and Meridian, described as follows, to-wit: Beginning at the center of said Section and running thence

west six hundred (600) feet, thence south parallel with the west line of said Section to an intersection with the south line of said Section, thence east along the south line of said Section to the quarter corner between the southeast and southwest quarters of said Section, thence north on the quarter section line between the southeast and the southwest quarter of said Section to the point of beginning, containing thirty-six and four-tenths (36.4) acres, more or less, all of said land in Section thirty-three (33), Township twenty-two (22) north, Range two (2) east, Gila and Salt River Base and Meridian, being in Coconino County, Arizona Territory;

The northwest quarter (N.W. ¼) of Section thirty-one (31), in Township twenty-two (22) north, Range one (1) east, Gila and Salt River Base and Meridian, containing one hundred and sixty (160) acres, more or less, in Coconino County, Arizona Territory;

The northeast quarter (N.E. ¼) of the northeast quarter (N.E. ¼) of Section nine (9), in Township twenty-one (21) north, Range one (1) east, Gila and Salt River Base and Meridian, containing forty (40) acres, in Coconino County, Arizona Territory;

The north half (N. ½) of the northeast quarter (N.E. ¼) of Section three (3), in Township twenty-one (21) north, Range one (1) east, Gila and Salt River Base and Meridian, containing eighty (80) acres, in Coconino County, Arizona Territory;

The southwest quarter (S.W. ¼) of the northwest quarter (N.W. ¼) and the southeast quarter (S.E. ¼) of the southwest quarter (S.W. ¼) of Section three (3), in Township twenty (20) north, Range four (4) east, Gila and Salt River Base and Meridian, containing eighty (80) acres, in Coconino County, Arizona Territory;

The north half (N. ½) and the southwest quarter (S.W. ¼) of Section nine (9), in Township twenty (20)

north, Range four (4) east, Gila and Salt River Base and Meridian, containing four hundred and eighty (480) acres, in Coconino County, Arizona Territory;

The south half (S. ½) and the northeast quarter (N.E. ¼) of the southwest quarter (S.W. ¼) and the southeast quarter (S.E. ¼) and the south half (S. ½) of the northwest quarter (N.W. ¼) and the northwest quarter (N.W. ¼) of the southwest quarter (S.W. ¼) of Section four (4), Township twenty-one (21) north, Range one (1) west, of the Gila and Salt River Base and Meridian, containing four hundred (400) acres, in Coconino County, Arizona Territory;

The southeast quarter (S.E. ¼) of Section nine (9) and the southwest quarter (S.W. ¼) of Section ten (10), in Township twenty-two (22) north, Range five (5) west, of the Gila and Salt River Base and Meridian, containing three hundred and twenty (320) acres, in Yavapai, Arizona Territory;

The northwest quarter (N.W. ¼) of Section thirteen (13), all of Section fifteen (15), the west half (W. ½) of Section nine (9), the west half (W. ½) of Section three (3), all of Section twenty-three (23), and the northwest quarter (N.W. ¼) of Section thirty-five (35) all in Township fifteen (15) north, range eighteen (18) west, New Mexico Base and Meridian, in McKinley County, Territory of New Mexico.

And it is Hereby Expressly Understood and Declared that the Santa Fe Pacific Company excepts from this grant and reserves unto itself, that certain strip of land two hundred feet in width upon which its railroad is situated, being one hundred feet in width on each side of the center line of the main track of said railroad, and also all lands adjacent to such strip of land that now are used or occupied by the Santa Fe Pacific Company for station grounds, work shops, depots, machine shops, switches, side-tracks, turn-tables, water stations or other

purposes in connection with the maintenance or operation of its said railroad.

To Have and to Hold the said lands and land grants and all other property, real, personal and mixed, rights, assets and appurtenances, hereby conveyed or assigned or intended to be conveyed or assigned unto the Development Company, its successor or successors and assigns, forever.

And the Santa Fe Pacific Company hereby irrevocably constitutes and appoints the Development Company, its successors and assigns, the Attorney-in-fact of the Santa Fe Pacific Company at any and all times in the name or on behalf of the Santa Fe Pacific Company but at the sole cost and expense of the Development Company, to do any and all acts and things which the Santa Fe Pacific Company might or could lawfully do, for the purpose of perfecting or enforcing all the rights, titles, interests, claims, and demands hereby granted and conveyed or intended to be granted and conveyed, and to use the name of the Santa Fe Pacific Company for such purposes and also in and about any legal proceedings and suits, either at law or in equity, as the Development Company, in its discretion, may deem necessary or expedient, hereby ratifying and confirming all acts which the Development Company may do in the premises.

And the Santa Fe Pacific Company further covenants that from time to time upon the request of the Development Company it, the Santa Fe Pacific Company, will make, do, execute, acknowledge, and deliver all such further acts, deeds, and assurances in law as may be reasonably required for effectuating the intention of these presents, and for the better assuring and confirming unto the Development Company, its successors and assigns, all and singular the premises, property, and rights hereby conveyed or assigned, or intended so to be.

In witness whereof, on the day and year first above written the Santa Fe Pacific Company, party of the first part, has caused this indenture to be signed by its President, and its corporate seal to be hereunto affixed, and the same to be attested by its Secretary.

SANTA FE PACIFIC
RAILROAD COMPANY,

By /s/ E. P. Ripley
Its President.

[SEAL]

Attest:

/s/ L. C. Deming
Its Secretary.

Form accepted:

Victor Morawetz
General Counsel

STATE OF ILLINOIS,)
) ss.
COUNTY OF COOK.)

Be it remembered that on this 10th day of August, A. D. 1903, before me, Edward J. Engel, a Notary Public for the State and County aforesaid, duly commissioned, personally appeared Edward P. Ripley, to me personally known and known to me to be the person whose name is subscribed to the foregoing instrument as President of the Santa Fe Pacific Railroad Company, the corporation that executed the within instrument, and known to me to be such President, and as such President acknowledged the execution of said instrument by said corporation as the free act and deed of said corporation, and that he voluntarily executed the same for the purpose and consideration therein expressed; and the said Edward P. Ripley, being by me duly sworn, did depose and say that he is the President of the Santa Fe Pacific Railroad Company, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors.

Witness my hand and official seal the day and year last above written.

/s/ Edward J. Engel
Notary Public

My Commission expires April 17, 1905.

[SEAL]

STATE OF NEW YORK,)
COUNTY OF NEW YORK,) ss.
BOROUGH OF MANHATTAN)

Be it remembered that on this 17th day of August, A. D. 1903, before me, D. J. Sheehan, a Notary Public for the State and County aforesaid, duly commissioned, personally appeared L. C. Deming, to me personally known and known to me to be the person whose name is subscribed to the foregoing instrument as Secretary of the Santa Fe Pacific Railroad Company, the corporation that executed the within instrument and known to me to be such Secretary, and as such Secretary acknowledged the execution of said instrument by said corporation as the free act and deed of said corporation, and that he voluntarily executed the same for the purpose and consideration therein expressed; and the said L. C. Deming, being by me duly sworn, did depose and say that he is the Secretary of the Santa Fe Pacific Railroad Company, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors.

Witness my hand and official seal the day and year last above written.

/s/ D. J. Sheehan
Notary Public

[SEAL]

My Commission expires Mar. 30th, 1904.

I hereby certify that the foregoing is a true copy of the original, which has been recorded as follows:

Bernallilo	Co.,	N.M.	Nov.	4,	1903,	book	33,	folio	396.
Valencia	"	"	"	5	"	"	A14	"	154.
McKinley	"	"	"	2	"	"	2	"	574.
Sandoval	"	"	"	3	"	"	1	"	1.
San Juan	"	"	"	16	"	"	14	"	14.
Socorro	"	"	"	4	"	"	49	"	311.
Apache	"	Ariz.	"	24	"	"	12	"	1.
Navajo	"	"	"	16	"	"	3	"	304.
Coconino	"	"	Dec.	7	"	"	17	"	262.
Yavapai	"	"	Nov.	30	"	"	67	"	41.
Mohave	"	"	"	17	"	"	16	"	20.
Yuma	"	"	Jan.	2,	1904	"	16	"	507.

January 18, 1904. Secretary, Santa Fe Pacific Development

APPENDIX J

THIS INDENTURE, made this 1st day of July in the year one thousand nine hundred and three by and between the SANTA FE PACIFIC RAILROAD COMPANY, a corporation created under and by virtue of an act of Congress approved March 3, 1897, (hereinafter called the "Santa Fe Pacific Company,") party of the first part, and THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation created under and by virtue of the laws of the State of Kansas, (hereinafter called the "Atchison Company,") party of the second part:

WHEREAS the Santa Fe Pacific Company is a corporation created and existing under and by virtue of an act of Congress approved March 3, 1897, entitled "An Act to define the rights of purchasers under mortgages authorized by an act of Congress approved April twentieth, eighteen hundred and seventy-one, concerning the Atlantic and Pacific Railroad Company"; and

WHEREAS in and by an act of Congress, entitled "An Act authorizing the Santa Fe Pacific Railroad Company to sell or lease its railroad property and franchise and for other purposes," approved June 27, 1902, the said Santa Fe Pacific Company was authorized and empowered to sell or lease its railroad and apurtenances, and all rights, powers, privileges, grants and franchises had or used in connection therewith to the Atchison Company; and

WHEREAS the said Santa Fe Pacific Company is the owner of a line of constructed railroad and telegraph together with switches, side-tracks, terminals, freight houses and yards, and real estate, properties and rights connected therewith, extending from Isleta Junction, on the west side of Rio Grande River, in the Territory of New Mexico, westwardly across the Territories of New Mexico and Arizona to the Colorado River, and across the same to its terminus at or near Needles, in the County of San Bernardino, the State of California, and entire line

from Isleta Junction to Needles being about five hundred sixty-five and two-tenths (565.2) miles in length; and

WHEREAS the Atchison Company is the owner of lines of constructed railroad and telegraph described as follows: A line extending from Chicago in the State of Illinois, in a southwesterly direction through the States of Illinois, Iowa, Missouri, Kansas, Colorado and the Territory of New Mexico to a point of connection with the said railway of the Santa Fe Pacific Company at or near Isleta Junction, New Mexico; and a line of railroad extending from a point of connection with the railroad of the Southern Pacific Railroad Company south of Kern City in the State of California, in a westerly and northwesterly direction to the City of San Francisco, in said State, and operates as lessee, under lease for a long term of years, that part of the railroad of the Southern Pacific Railroad Company extending from a point of connection with the railroad of the said Santa Fe Pacific Company at Needles to Mojave, in the State of California, from which point to a point of connection with the railroad of the Atchison Company south of said Kern City and said Atchison Company has acquired the right to use and operate the tracks of the said Southern Pacific Railroad Company between said last named points for a long term of years; and

WHEREAS the said lines of railroad of the Atchison Company form a continuous line with the said line of railroad of the Santa Fe Pacific Company and all the said lines of railroad aforesaid are operated as continuous and connected lines of railway and are not in competition with or parallel to each other; and

WHEREAS the Santa Fe Pacific Company has heretofore issued, and there are now outstanding and unpaid, its First Mortgage Four Per Cent. bonds for the aggregate principal sum of sixteen million dollars ($16,000,000), secured by a certain Mortgage or Deed of Trust dated the fifteenth day of July, 1897, executed by said Santa

Fe Pacific Company to Union Trust Company of New York, as Trustee; and

WHEREAS the Directors of the Santa Fe Pacific Company and the Directors of the Atchison Company have agreed upon the sale by the Santa Fe Pacific Company to the Atchison Company and the purchase by the Atchison Company from the Santa Fe Pacific Company of all its railroad and other property, including all rights, powers, privileges, grants and franchises, upon the terms and conditions in this indenture set forth, and the owners and holders of more than two-thirds (⅔) in amount of the capital stock of the Atchison Company, at a meeting of the stockholders of such company, called for that purpose, upon due notice given in the manner provided by law, have assented to and approved the same; and

WHEREAS the Atchison Company owns all the shares of the capital stock of the Santa Fe Pacific Company, except thirteen (13) shares held by the directors thereof, and has expressly in writing approved of and assented to the execution of this indenture and the sale hereunder upon the terms and conditions of this indenture; and said directors, individually have all in like manner approved of and assented thereto;

NOW THEREFORE THIS INDENTURE WITNESSETH that for and in consideration of the premises and of the sum of One Dollar ($1) to it duly paid by the Atchison Company at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, the Santa Fe Pacific Company has granted, bargained, sold, assigned, released, conveyed, confirmed and set over, and by these presents does grant, bargain, sell, assign, release, convey, confirm and set over to the Atchison Company and its successors and assigns, forever, all and singular, the railroad and other property, including all rights, powers, privileges, grants and franchises of the Santa Fe Pacific Company, and including the rail-

road and other property more particularly described as follows:

All the railroad and telegraph line heretofore by deed, dated June 24, 1897, conveyed by Aldace F. Walker, R. Somers Hayes and Victor Morawetz to said Santa Fe Pacific Company, beginning at Isleta Junction, on the west side of Rio Grande River, in the Territory of New Mexico, and thence running westwardly through the counties of Bernalillo, McKinley and Valencia, in the Territory of New Mexico, and the Counties of Apache, Navajo, Coconino, Yavapai and Mojave in the Territory of Arizona, to the Colorado River, and across the same to its terminus at or near Needles in the County of San Bernardino in the State of California, said entire line from said Isleta Junction to Needles being about five hundred sixty-five and two-tenths (565.2) miles in length, together with all other property described in said deed; and all additions to, betterments of or improvements upon said railroad and other property so conveyed; and

ALSO, every other railroad, telegraph line, extension, branch line and spur track, now owned by the Santa Fe Pacific Company.

INCLUDING also the right of way through the public lands, all grounds used or set apart for station-buildings, workshops, depots, machine shops, side tracks, turn-tables and water stations, and the right, power and authority to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof, granted by the United States to the Atlantic and Pacific Railroad Company by Section 2 of the Act of Congress approved July 27, 1866, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast," and including also the right to such additional grounds for station-buildings,

workshops, depots, machine-shops, side-tracks, turntables and water-stations as from time to time may be found necessary upon the public domain, and as granted by the Act of Congress aforesaid to the Atlantic and Pacific Railroad Company; and also all other ways and rights of way now owned by the Santa Fe Pacific Company for the purposes of or appurtenant to any railroad or telegraph line, extension, branch line or spur track now owned by the Santa Fe Pacific Company; and

INCLUDING also all side tracks and passing tracks, station buildings, office buildings, depots, work shops, machine shops, engine houses, warehouses, water tanks, water stations, turn-tables, section houses, viaducts, bridges and other buildings and structures of every character, all reservoirs, dams, springs, wells, pipe lines, and all other appurtenances whatsoever and wheresoever they may be situated (including the lands used therefor or set apart for the use thereof), now owned by the Santa Fe Pacific Company, pertaining to the use, operation or maintenance of any of said railroads, telegraph lines, extensions, branches or spur tracks now so owned; all engines, tenders, cars and other rolling stock and equipment, and all tools, machinery, rails, spikes, materials, supplies and other chattels now owned by the Santa Fe Pacific Company; all leases or leasehold rights of or in any railroad, telegraph line or appurtenances, and all contracts and contract rights, easements, privileges and other rights in any manner relating or pertaining to the use, operation or maintenance of any railroad, telegraph line or appurtenances, now leased or operated by the Santa Fe Pacific Company, including all the leasehold estate rights, powers, and interests of the Santa Fe Pacific Company as assignee of The Atchison, Topeka and Santa Fe Railway Company in respect to a certain line of railroad extending from Mojave to Bakersfield, in the State of California, under or by virtue of certain indenture of lease and contract

dated January 16, 1899, between the Southern Pacific Railroad Company, the Southern Pacific Company, and The Atchison, Topeka and Santa Fe Railway Company, and all the leasehold estate, rights, powers, and interests of the Santa Fe Pacific Company as assignee of The Atchison, Topeka and Santa Fe Railway Company in respect to a certain line of railroad therein described as the "Mojave Division" under or by virtue of an indenture of lease and contract dated July 15, 1898, between the Southern Pacific Railroad Company, the New Mexico and Arizona Railroad Company, the Sonora Railroad Company, Limited, The Atchison, Topeka and Santa Fe Railway Company, and the Southern Pacific Company; all books, books of record, books of account, papers, maps, and other documents; all office furnture and fittings in any manner relating or pertaining to any of the railroads and appurtenances or to the use, operation, or maintenance thereof; and all other property, real, personal, or mixed, of every description whatsoever of the Santa Fe Pacific Company, and all rights, powers, privileges, grants, and franchises of the Santa Fe Pacific Company.

SUBJECT NEVERTHELESS to the said mortgage dated July 15th, 1897, executed by the Santa Fe Pacific Company to said Union Trust Company of New York as trustee, hereinbefore mentioned; and subject also to all duties, obligations, conditions and restrictions relating to the railroad and property hereby sold which now are binding upon said Santa Fe Pacific Company, as fully as though such sale had not been made.

TO HAVE AND TO HOLD the said railroad and other property, with the appurtenances thereunto belonging unto the Atchison Company, its successor, or successors, and assigns forever.

IN WITNESS WHEREOF, on the day and year first above written the Santa Fe Pacific Company, party of the first part, has caused this indenture to be signed by its Presi-

dent and its corporate seal to be hereunto affixed and the same to be attested by its Secretary.

SANTA FE PACIFIC RAILROAD COMPANY,

(Sgd) By E. P. RIPLEY,
Its President.

[SEAL]

Attest:

(Sgd) L. C. DEMING,
Secretary.

STATE OF ILLINOIS,)
) ss.
COUNTY OF COOK.)

Be it remembered that on this 10th day of August, A. D. 1903, before me, Edward J. Engel, a Notary Public for the State and County aforesaid, duly commissioned, personally appeared Edward P. Ripley, to me personally known and known to me to be the person whose name is subscribed to the foregoing instrument as President of the Santa Fe Pacific Railroad Company, the corporation that executed the within instrument, and known to me to be such President, and as such President acknowledged the execution of said instrument by said corporation as the free act and deed of said corporation, and that he voluntarily executed the same for the purpose and consideration therein expressed; and the said Edward P. Ripley, being by me duly sworn, did depose and say that he is the President of the Santa Fe Pacific Railroad Company, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors.

Witness my hand and official seal the day and year last above written.

(Sgd) EDWARD J. ENGEL,
Notary Public.

My Commission expires April 17, 1905. [SEAL]

STATE OF NEW YORK,)
COUNTY OF NEW YORK,) ss.
BOROUGH OF MANHATTAN)

Be it remembered that on this 17th day of August, A. D. 1903, before me, D. J. Sheehan, a Notary Public for the State and County aforesaid, duly commissioner, personally appeared L. C. Deming, to me personally known and known to me to be the person whose name is subscribed to the foregoing instrument as Secretary of the Santa Fe Pacific Railroad Company, the corporation that executed the within instrument and known to me to be such Secretary, and as such Secretary acknowledged the execution of said instrument by said corporation as the free act and deed of said corporation, and that he voluntarily executed the same for the purpose and consideration therein expressed; and the said L. C. Deming, being by me duly sworn, did depose and say that he is the Secretary of the Santa Fe Pacific Railroad Company, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors.

Witness my hand and official seal the day and year last above written.

(Sgd) D. J. SHEEHAN,
Notary Public.

[SEAL]

My Commission expires Mar. 30th, 1904.

APPENDIX K

THIS INDENTURE, Made this eleventh day of March, 1904, by and between the Santa Fe Pacific Development Company (hereinafter called the Development Company), a corporation created and existing under and by virtue of the laws of the State of California, party of the first part, and the Santa Fe Pacific Railroad Company (hereinafter called the Santa Fe Pacific Company), a corporation created and existing by virtue of an Act of Congress approved March 3, 1897, party of the second part:

Whereas, the party of the second part executed a deed bearing date the thirtieth day of May, 1903, and duly recorded, conveying to the party of the first part the lands, rights and privileges hereinafter described and conveyed, and

Whereas, it has been agreed between the parties hereto that the party of the first part shall convey to the party of the second part all of the right, title and interest acquired by the party of the first part in and to said lands, rights and privileges as conveyed to it by said deed;

Now, Therefore, this indenture witnesseth, that for and in consideration of the sum of one dollar, to it duly paid by the said Santa Fe Pacific Company, at or before the ensealing and delivery of these presents, and of other valuable considerations, the receipt whereof is hereby acknowledged, the Development Company has granted, bargained, sold, assigned, released, conveyed, confirmed and set over, and by these presents does hereby grant, bargain, sell, assign, release, convey, confirm and set over to the Santa Fe Pacific Railroad Company, its successors and assigns forever, all the right, title, interest, claim and demand which were conveyed by the Santa Fe Pacific Railroad Company by its deed dated May 30th, 1903, to the Santa Fe Pacific Development Company, in and to all lands and all rights which were granted to the

Atlantic & Pacific Railroad Company under and by virtue of Section 3 of an Act of Congress approved July 27, 1866, including all lands for which patents have been granted or for which patents might thereafter be granted, whether such lands had been selected or surveyed or might thereafter be selected or surveyed, and whether such lands were located within the limits specifically designated in said Section 3 of said Act of Congress approved July 27, 1866, or were lands selected in lieu thereof not more than ten miles beyond said limits, and including all lands which the Santa Fe Pacific Company was or might be entitled to receive by way of indemnity in lieu of lands within its place or indemnity limits.

To Have and to Hold the said lands and land-grants and all other property, real, personal and mixed, rights, assets and appurtenances hereby conveyed or assigned, or intended to be conveyed or assigned, unto the Santa Fe Pacific Company, its successor, or successors and assigns, forever.

And the Development Company further covenants that from time to time upon the request of the Santa Fe Pacific Company it (the Development Company) will make, do, execute, acknowledge and deliver all such further acts, deeds and assurances in law as may be reasonably required for effectuating the intention of these premises, and for the better assuring and confirming unto the Santa Fe Pacific Company, its successors and assigns, all and singular the premises, property, and rights hereby conveyed or assigned, or intended so to be.

And the said Development Company does hereby surrender up and relinquish its appointment as attorney in fact of the Santa Fe Pacific Company as in said indenture of May 30, 1903, provided or set forth, and does hereby release the Santa Fe Pacific Company from its appointment of the Development Company, its successors and assigns, as attorney in fact of the Santa Fe Pacific

Company, in said indenture of May 30, 1903, provided and set forth.

In witness whereof, on the day and year first above written, the Development Company has caused this indenture to be signed by its Vice-President, and its corporate seal to be hereunto affixed and the same to be attested by its Assistant Secretary.

SANTA FE PACIFIC DEVELOPMENT COMPANY,

[SEAL]

Approved as to form By .....
Vice President.

Attest:

(Signed) G. Holterhoff, Jr.,
Assistant Secretary.

STATE OF CALIFORNIA,

ss.

COUNTY OF LOS ANGELES.

Be it remembered that on this eleventh day of March, A.D. 1904, before me, a Notary Public in and for the State and County aforesaid, duly commissioned, personally appeared Howel Jones, to me personally known, and known to me to be the person whose name is subscribed to the foregoing instrument as Vice President of the Santa Fe Pacific Development Company, the corporation that executed the within instrument, and known to me to be such Vice President; and also on the day and year last above written personally appeared G. Holterhoff, Jr., to me personally known, and known to me to be the person whose name is subscribed to the foregoing instrument as Assistant Secretary of the Santa Fe Pacific Development Company, the aforesaid corporation that executed the within instrument, and known to me to be such Assistant Secretary; and the aforesaid Howel Jones, as such Vice President, and the aforesaid G. Holterhoff, Jr., as such Assistant Secretary, each acknowledged the execution of said instrument by said corporation as the free act and deed of said corporation and that they each voluntarily executed the same for the purpose and consideration therein expressed.

And the said Howel Jones, being by me duly sworn, did depose and say that he is the Vice President of the Santa Fe Pacific Development Company, and that the seal affixed to said instrument is the corporate seal of said corporation, and that the instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors; and the said G. Holterhoff, Jr., being by me duly sworn, did depose and say that he is the Assistant Secretary of the Santa Fe Pacific Development Company, and that the seal affixed to said instrument is the corporate seal of said corporation, and that

the instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors.

Witness my hand and official seal the day and year last above written.

[SEAL] .....

Notary Public.

My Commission expires January 30, 1907

A true copy of the original deed filed in my office.

/s/ E. S. Copeland,
Assistant Secretary.

July 2nd, 1907.